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No. 10-

10-62

IN THE

Supreme Court of the United States

LUIS C. RADICE, M.D., EDWARD E. GAHRES, M.D., and GAHRES AND RADICE, M.D.S., LTD.,

Petitioners,

v.

ALICIA M. ETCHEBARNE-BOURDIN, individually, as administrator of the ESTATE OF BABY GIRL ETCHEBARNE-BOURDIN, and on behalf of the heirs of BABY GIRL ETCHEBARNE-BOURDIN; and MAURICIO BOURDIN, individually, as administrator of the ESTATE OF BABY GIRL ETCHEBARNE-BOURDIN, and on behalf of the heirs of BABY GIRL ETCHEBARNE-BOURDIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause allow a nonresident defendant to be haled into court in a foreign jurisdiction when the plaintiff's cause of action bears no relation to the defendant's only purposeful contact with the forum?

2. Does a jurisdiction's long-arm statute violate the Due Process Clause when it is applied to a nonresident defendant whose only purposeful contact with the forum bears no relation to the plaintiff's cause of action?

CORPORATE DISCLOSURE STATEMENT

Edward E. Gahres, M.D., Ltd., formerly known as Gahres and Radice, M.D.S., Ltd. (G&R), is incorporated in Virginia. It has no parent corporations and no publicly held company owns 10 percent or more of its stock.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The panel opinion of the District of Columbia Court of Appeals, decided October 22, 2009, is officially reported at 982 A.2d 752 (D.C. 2009) and is reproduced at Appendix A, at App. 1a-24a. It is referred to as *Bourdin II* in this petition.

The order of the Superior Court of the District of Columbia, Civil Division, dated July 29, 2005, is not officially reported. It is reproduced at Appendix B, at App. 25a-95a.

The panel opinion of the District of Columbia Court of Appeals, decided June 1, 2000, is officially reported at 754 A.2d 322 (D.C. 2000) and is reproduced at Appendix C, at App. 96a-111a. It is referred to as *Bourdin I* in this petition.

The amended order of the Superior Court of the District of Columbia, Civil Division, dated June 6, 1996, is not officially reported. It is reproduced at Appendix D, at App. 112a-177a.

The order of the District of Columbia Court of Appeals denying a Petition for Rehearing *En Banc* was filed April 8, 2010 and is not officially reported. It is reproduced at Appendix E, at App. 178a-179a.

JURISDICTIONAL STATEMENT

The judgment of the District of Columbia Court of Appeals sought to be reviewed was entered on October 22, 2009. The order denying rehearing *en banc* was entered on April 8, 2010.

This Court has jurisdiction to review the judgment of the District of Columbia Court of Appeals pursuant to 28 U.S.C. § 1257 because the federal issue present in the case has been finally determined by the highest court of the District of Columbia and is not subject to further review there. *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) ("Although there has not yet been a trial on the merits in this case, . . . as in several past cases presenting jurisdictional issues in this posture, we conclude that the judgment below is final within the meaning of [28 U. S. C.] § 1257." (Citations and quotations omitted)); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (noting that the Delaware Supreme Court's judgment affirming the trial court's denial of the defendant's motion to quash service based on a lack of sufficient contacts with Delaware was "plainly final on the federal issue and [was] not subject to further review in the state courts."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Cal. Sup. Ct.*, 436 U.S. 84 (1978).

Additionally, because this petition draws into question the constitutionality of the District's long-arm statute, 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved is the Fifth Amendment of the United States Constitution, which states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provision involved is D.C. Code § 13-423(a)(4), which states as follows:

> A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's— . . . (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case and Material Proceedings

The District of Columbia Court of Appeals decided in *Bourdin II* that personal jurisdiction exists over the defendants based on: (1) a single telephone call placed by Mrs. Bourdin in the District to the defendants' office in Virginia, and (2) the doctors' occasional attendance at medical education events in the District. As a result of this decision, defendants must submit to a trial in the District on a claim that bears no relationship to their purposeful contacts with it. That result contravenes the Due Process Clause of the Fifth Amendment and prior decisions of this Court. It also conflicts with the decisions of other federal Courts of Appeals and state supreme courts. It should therefore be reviewed and reversed.

The issue of whether personal jurisdiction exists over the defendants is a question that has now been pending for over sixteen years.

In an amended order entered June 6, 1996 that dismissed the defendants for lack of personal jurisdiction, the trial court succinctly explained the nature of this case. It originated from a lawsuit brought by a "Virginia resident seeking medical treatment in connection with her pregnancy from Virginia doctors at their offices in Virginia and asserting that their negligent treatment, all of which occurred in Virginia [in 1990], resulted in her giving birth to a stillborn child in a Virginia hospital and suffering other adverse consequences." App. at 112a. Plaintiffs filed an amended

complaint in the District in 1993 naming Dr. Gahres, Dr. Radice, and Gahres and Radice, M.D.S., Ltd. (G&R) as defendants.

Due to the attenuated connection of this case with the District, defendants filed a motion to dismiss for lack of personal jurisdiction in 1994. As pertinent to this petition, Defendants argued that personal jurisdiction could not be exercised pursuant to the District's long-arm statute, D.C. Code § 13-423, or the Due Process Clause.[1] After allowing discovery on the personal jurisdiction issues raised in defendants' pleadings, the trial court received evidence and briefs and convened multiple hearings so the parties could argue the issues orally. App. at 113a-114a.

By opinion and order dated June 6, 1996, the trial court found that the doctors engaged in a "persistent course of conduct" in the District, as that term is used in D.C. Code § 13-423(a)(4), because of their periodic attendance at medical education events. App. at 160a. But it declined to assert personal jurisdiction on the basis of the "persistent course of conduct" because doing so "might violate due process, especially where any injury is unrelated to that conduct." App. at 161a. Thus, the trial court ultimately agreed with defendants that personal jurisdiction did not exist and dismissed the case. App. at 177a. Plaintiffs appealed that decision to the District of Columbia Court of Appeals, focusing only on whether jurisdiction could be exercised pursuant to D.C. Code § 13-423(a)(1) and (a)(4). App. at 97a.

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1. These arguments were presented in Defendants' Motion to Dismiss filed January 18, 1994 and Defendants' Memorandum in Support of Their Rebuttal to Plaintiff's Opposition to Defendants' Motion to Dismiss filed April 15, 1994.

In *Bourdin I*, the District of Columbia Court of Appeals remanded the case to the trial court for reconsideration of the then recently-issued opinion in *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000) (*en banc*). App. at 96a. Specifically, *Bourdin I* directed the trial court on remand to analyze whether the plaintiffs' claims arose from the doctors' "persistent course of conduct": "To assert personal jurisdiction under these subsections, the claim asserted must 'arise from' . . . a 'persistent course of conduct' in the District of Columbia." App. at 97a, 107a-108a.

On remand, the trial court received supplemental briefs from the parties. App. at 26a. Defendants renewed their argument that personal jurisdiction could not be asserted consistent with the Due Process Clause.[2] By opinion and order dated July 29, 2005, the trial court reevaluated the case in light of *Shoppers*. And following *Bourdin I*'s specific mandate, the trial court analyzed whether the persistent course of conduct related to plaintiffs' claims. App. at 66a-68a. After doing so, it once more determined that personal jurisdiction did not exist and dismissed the case. App. at 95a. Plaintiffs appealed.

During this second appeal, defendants argued again that personal jurisdiction could not be exercised under D.C. Code § 13-423 (a)(1) or (a)(4) and the Due Process Clause. Defendants also argued that, to avoid constitutional infirmity, D.C. Code § 13-423(a)(4) must be interpreted to require that the "persistent course of

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2. These constitutional concerns were raised again in, among other places, Defendants' Memorandum in Response to the Court's Order of June 30, 2003 filed September 5, 2003.

conduct" factor relate to plaintiff's claim. Defendants further argued that the court should analyze each defendant's contacts individually and that, when such an analysis is performed, it is clear no defendant had sufficient minimum contacts to justify the assertion of personal jurisdiction.[3]

On October 22, 2009, the District of Columbia Court of Appeals in *Bourdin II* finally concluded that personal jurisdiction could not be exercised under D.C. Code § 13-423(a)(1) but that it could be exercised under D.C. Code § 13-423(a)(4). App. at 16a, 24a. In an Orwellian twist, *Bourdin II* disagreed with the trial court's decision to analyze whether the "persistent course of conduct" relates to plaintiffs' claims, App. at 2a, despite the fact that *Bourdin I* instructed the trial court that the persistent course of conduct must relate to plaintiffs' claims. App. at 97a. *Bourdin II* determined the trial court had personal jurisdictional over the defendants and remanded the case to it for further proceedings. App. at 24a.

Defendants filed a Petition for Rehearing *En Banc* with the District of Columbia Court of Appeals raising the same constitutional concerns previously discussed, but a divided court denied it by order dated April 8, 2010. App. at 178a; Petition for Rehearing *En Banc* filed November 5, 2009.

All state court remedies having been exhausted to decide the federal questions of whether (1) the trial court

3. These arguments were presented in Brief of Appellees filed October 10, 2006.

may assert personal jurisdiction over these nonresident defendants consistent with due process and (2) the application of D.C. Code § 13-423(a)(4) to these defendants violates their rights under the Due Process Clause, defendants petition this Court for review.

B. Pertinent Facts

Due to the lengthy history of this case, findings of fact that plaintiffs have never appealed or contested, and the narrow grounds upon which the *Bourdin II* court found personal jurisdiction, the facts relevant to this Petition are straightforward and cannot be disputed.

In 1990, plaintiff Alicia Etchebarne-Bourdin resided in Burke, Virginia with her husband Mauricio Bourdin. They both worked at the International Monetary Fund (IMF) in the District. App. at 116a.

Mrs. Bourdin became pregnant in 1990. She sought care and treatment during her pregnancy from Dr. Gahres and Dr. Radice at their office in Alexandria, Virginia. Dr. Gahres and Dr. Radice practiced in Virginia only, and all of Mrs. Bourdin's visits to them occurred in Virginia only. App. at 117a.

On October 29, 1990, Mrs. Bourdin was involved in a car accident in the District as she left work at the IMF. Another driver hit her car from behind. App. at 117a.

Immediately after the accident, Mrs. Bourdin went back into the IMF and called the doctors' office in Virginia to report it. App. at 117a.

A receptionist, Delores Staursky, answered Mrs. Bourdin's October 29, 1990 telephone call. App. at 117a-118a. The receptionist told Mrs. Bourdin to keep her next appointment, which was scheduled to occur on November 2, 1990. App. at 118a.

Dr. Gahres was not in the office at all on that day, so he was not present when the receptionist answered Mrs. Bourdin's telephone call. App. at 118a. Though Dr. Radice was in the office for part of the day, there is no evidence he was present when the telephone call was answered. App. at 118a. Indeed, neither Dr. Gahres nor Dr. Radice dispensed any advice to Mrs. Bourdin during the telephone call, and neither instructed the receptionist what to say. App. at 118a.

Mrs. Bourdin visited the doctors at their office in Virginia on November 2, 9, and 16, 1990. She gave birth to a stillborn baby on November 17, 1990 at Alexandria Hospital in Virginia. App. at 118a-119a.

In her lawsuit, Mrs. Bourdin claimed, among other things, that the defendants negligently gave bad advice on the October 29, 1990 telephone call. App. at 118a.

During discovery allowed on the personal jurisdiction issue, plaintiffs learned Drs. Gahres and Radice occasionally attended Grand Rounds at George Washington Hospital in the District. Grand Rounds "involved reviewing case histories of patients, as well as topics related to the practice of gynecology and obstetrics." The doctors went to Grand Rounds "for the sole purpose of continuing medical education." App. at 29a. Dr. Gahres went to Grand Rounds approximately

2.4 times a month. Dr. Radice attended approximately 1.7 times a month. App. at 30a.

The doctors also occasionally attended meetings of the Washington Gynecological Society (WGS) in the District. These too were for the doctors' personal educational benefit. App. at 29a. WGS held meetings six to eight times a year (mostly in the District), and the doctors usually tried to attend. Assuming they attended seven meetings per year and that all those meetings were in the District, the trial court estimated attendance at WGS meetings brought the doctors into the District 0.6 times a month. App. at 29a.

Neither doctor attended WGS meetings or Grand Rounds as agents of G&R. App. at 30a. Further, the trial court specifically held that plaintiffs' claim did not arise from their attendance at these events. App. at 68a. *Bourdin II* affirmed that holding: "appellants' malpractice actions cannot be said to 'arise from' the doctors' attendance at these meetings." App. at 13a-14a.

Apart from the telephone call and Grand Rounds and WGS, *Bourdin II* analyzed other "contacts" defendants had with the District, but it held that none of them were sufficient to justify personal jurisdiction. App. at 10a-16a.

Bourdin II found personal jurisdiction to exist solely under D.C. Code § 13-423(a)(4) on the basis of (1) Mrs. Bourdin's telephone call and (2) the doctors' periodic attendance at Grand Rounds and WGS meetings. App. at 17a-20a, 18a n.8.

REASONS FOR GRANTING THE PETITION

Bourdin II's decision to assert personal jurisdiction over the defendants contravenes the Due Process Clause and undermines this Court's well-established precedent regarding what the Due Process Clause requires for the assertion of specific personal jurisdiction. This Court has held that the assertion of specific jurisdiction requires a plaintiff's claim to arise from or relate to a defendant's purposeful contacts with the forum. But *Bourdin II*'s decision is directly opposed to this principle because it asserts specific personal jurisdiction over the defendants without requiring any relation between their purposeful contacts and the plaintiffs' claims.

Also, in basing its assertion of specific personal jurisdiction on a single telephone call initiated not by the defendants but by the plaintiff, *Bourdin II* conflicts with the decisions of other federal circuit courts of appeal and state supreme courts.

Finally, *Bourdin II* interpreted and applied the District's long-arm statute, which was derived from the Uniform Interstate and International Procedure Act, in an unconstitutional manner. *Bourdin II*'s interpretation of the District's long-arm statute permits the assertion of specific personal jurisdiction in cases where the plaintiff's claim does not arise from the defendant's only purposeful contact with the forum. This interpretation as applied to these defendants does not comport with due process.

Thus, the Court should grant the writ to correct an unconstitutional interpretation of a model-long arm statute, to resolve the conflict *Bourdin II* poses with other federal and state courts, and to establish the superiority and uniformity of this Court's principles regarding the assertion of specific personal jurisdiction. The Court should also grant the writ to right a clear violation of the defendants' liberty interests under the Due Process Clause.

I. *Bourdin II*'s Assertion of Specific Personal Jurisdiction Over the Defendants Was Unconstitutional Because Plaintiffs' Claims Do Not Relate to the Defendants' Purposeful Contacts with the District

A. The Two "Contacts" Relied Upon by *Bourdin II* Do Not Confer Personal Jurisdiction over the Defendants

Bourdin II violated defendants' due process rights when it asserted specific personal jurisdiction[4] over them pursuant to D.C. Code § 13-423(a)(4)[5] despite the

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4. As opposed to general personal jurisdiction. "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 415 (1984).

5. D.C. Code § 13-423(a)(4) is a specific personal jurisdiction statute. *Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 232 (D.C. 2006) ("When jurisdiction is based

(Cont'd)

fact that plaintiffs' claims bear no relation to defendants' purposeful contacts with the District. To exercise specific personal jurisdiction consistent with due process, a court must find that plaintiffs' cause of action arises out of or relates to the defendants' purposeful contacts with the forum.[6] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984). This cannot be done using the two "contacts" relied upon in *Bourdin II*.

(Cont'd)

on this section, the claim for relief must 'arise[] from' the acts conferring jurisdiction over the defendant. This is sometimes referred to as specific jurisdiction." (Citations omitted)); *see also Ventura v. Bebo Foods, Inc.*, 595 F. Supp. 2d 77, 83 (D.D.C. 2009) ("Jurisdiction based solely on this provision [subsections (a)(1) and (a)(4)] is specific in nature."); *Shirlington Limousine & Transp., Inc. v. San Diego Union-Tribune*, 566 F. Supp. 2d 1, 4 (D.D.C. 2008) (same).

6. This constitutional due process requirement is embedded in the District's long-arm statute; its command that the claim for relief must "arise from" the enumerated contacts bookends the statute. At the front end, D.C. Code § 13-423(a) provides: "A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's— . . . ." At the back end, D.C. Code § 13-423(b) reminds: "When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him."

First, the doctors' only *purposeful* contact with the District—their periodic attendance at Grand Rounds and WGS meetings—cannot confer personal jurisdiction because plaintiffs' claims did not relate to or arise from them. The doctors attended these events only for their own personal educational benefit; they had no bearing on or connection to plaintiffs' claims. App. at 29a. Indeed, *Bourdin II*, consistent with the trial court, specifically held that "appellants' malpractice actions cannot be said to 'arise from' the doctors' attendance at these meetings." App. at 14a.

Second, Mrs. Bourdin's October 29, 1990 telephone call cannot authorize the court's exercise of personal jurisdiction because it was not a purposeful contact the defendants made with the District. In fact, it was quite the opposite. Mrs. Bourdin acted unilaterally when, after the pure happenstance of a car accident, she telephoned Virginia from the District. But "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denkla*, 357 U.S. 235, 253 (1958).

Remarkably, *Bourdin II* agreed with this principle and held early in its opinion that Mrs. Bourdin's telephone call "cannot—consistent with the limits of due process—serve as a basis for jurisdiction." App. at 11a. But in a curious judicial pirouette, the court later relied on the telephone call as the basis for jurisdiction under D.C. Code § 13-423(a)(4). App. at 18a n.8, 18a-20a. It should not have done so for the very reasons it articulated—Mrs. Bourdin's telephone call was her own

unilateral act and was not a contact the defendants purposefully made with the District.[7] The telephone call cannot, consistent with the Due Process Clause, serve as a basis for specific personal jurisdiction.

Since the doctors' only purposeful contact with the District was their periodic attendance at Grand Rounds and WGS meetings, and the plaintiffs' claim did not arise from or relate to these purposeful contacts, *Bourdin II* incorrectly concluded that the defendants were subject to specific personal jurisdiction. That incorrect conclusion violates the defendants' rights under the Due Process Clause of the Fifth Amendment not to be haled

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7. This result conflicts with decisions from other federal circuit courts of appeal and state high courts. *See, e.g., Adams v. Adams*, 601 F.3d 1, 8 (1st Cir. 2010) ("A phone call from Bernard to Lee in Texas concerning a contract that Bernard demanded that Lee execute is not sufficient evidence that Lee 'reached into Massachusetts.'"); *Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1251-52 (11th Cir. 2000) (holding that a "single telephone call, by the buyer of a service upon the advice of another" may meet the "technical requirements" of the Florida long-arm statute, but that the Due Process Clause's "considerations of minimum contacts and fair play prevent the action from going forward in this court."); *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 42-43 (8th Cir. 1988) ("Appellants' telephone calls to Lake Havasu are the very kind of 'unilateral activities' this court has found insufficient to establish personal jurisdiction."); *Aviation Assoc. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 180 (S.C. 1991) ("Every communication between the parties was initiated by Aviation. Cobra merely responded to Aviation's unsolicited, unilateral contact by talking on the telephone to Aviation when Aviation called . . . . This type of attenuated, isolated contact should not subject Cobra to suit in the initiator's home forum." (Quotations omitted)).

into court on a claim that does not arise from their purposeful contacts with the jurisdiction. *Burger King*, 471 U.S. at 472.

B. Analyzing Whether Each Defendant Is Subject to Personal Jurisdiction in the District, as Required by the Due Process Clause, Clearly Reveals Personal Jurisdiction Cannot Be Asserted over Any Defendant

The conclusion that *Bourdin II* violated defendants' due process rights is bolstered when personal jurisdiction is analyzed as to each defendant. The Due Process Clause itself requires such an analysis.[8] *See Calder v. Jones*, 465 U.S 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). When that required analysis is performed, it is clear personal jurisdiction cannot be exercised consistently with due process or D.C. Code § 13-423(a)(4) as to any defendant.

1. The Doctors' Contacts with the District Do Not Authorize the Assertion of Personal Jurisdiction

First, there is no evidence that either doctor participated in Mrs. Bourdin's telephone call—the very "contact" relied upon by *Bourdin II* to satisfy due process. App. at 18a n.8, 18a-20a; *see also infra* Part II. To the contrary, the evidence, which plaintiffs did not

8. Despite defendants' specific request in their Brief of Appellees, the *Bourdin II* court failed to assess each defendants' contacts individually.

dispute on appeal, established that neither Dr. Gahres nor Dr. Radice dispensed advice, negligent or otherwise, to plaintiffs on the October 29, 1990 telephone call. The evidence established only that a G&R receptionist told Mrs. Bourdin to keep her next appointment. *Bourdin II* recognized this: "Ms. Etchebarne-Bourdin telephoned Dr. Radice's office in Virginia from her office at the IMF in the District. She explained what had happened *to the receptionist* who answered the telephone; *the receptionist advised her* to keep her regular appointment on November 2nd, four days later." App. at 5a (emphasis added). Dr. Gahres was not present at all in the office on October 29, 1990. App. at 118a. And although *Bourdin II* went out of its way to state that Dr. Radice was in the office for part of that day, App. at 5a n.3, it did not conclude (as it could not) that Dr. Radice was actually present when the telephone call was received. Indeed, the trial court made a factual finding (which should be binding on appeal) that "[n]either doctor spoke with Mrs. Bourdin by phone on the day of the accident, and plaintiffs have provided the court with *no evidence* that either doctor's instructions were conveyed through the receptionist who did speak with Mrs. Bourdin." App. at 152a-153a n.31, 118a (emphasis added).

Subjecting Dr. Gahres and Dr. Radice to a trial in the District when there is no evidence either of them participated in the "contact" with the District—Mrs. Bourdin's telephone call—giving rise to plaintiffs' claims would constitute a serious violation of their liberty interests protected by the Due Process Clause.[9] "The

9. Commission of a tortious act or omission outside the District is also a threshold statutory requirement under D.C. Code § 13-423(a)(4). It is difficult to imagine how personal jurisdiction over the doctors could be exercised pursuant to this statute when there is no evidence to trigger its required provisions.

personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982). The doctors' enjoyment of this liberty interest would be lost forever if this Court does not grant their petition and reverse *Bourdin II*'s flagrant error.

2. G&R's Contacts with the District Do Not Authorize the Assertion of Personal Jurisdiction

Second, G&R's due process interests will also be destroyed when it is subjected to a trial in the District because it never purposefully initiated contact with the District. Rather, it was Mrs. Bourdin who purposefully initiated contact when she unilaterally telephoned G&R's office in Virginia from the District. The simple act of G&R's receptionist in answering a telephone call from the District cannot equate to purposeful availment or contact. G&R quite simply did not purposefully contact the District. And because it did not, it cannot be subject to personal jurisdiction there.[10]

10. The engagement in a "persistent course of conduct" is, like the act or omission requirement, a condition precedent for the exercise of personal jurisdiction pursuant to D.C. Code § 13-423(a)(4). The trial court specifically determined that "there is . . . no basis for a finding that G & R, Ltd. has engaged in a persistent course of conduct" in the District. App. at 159a. The trial court also determined that there was no evidence Dr. Gahres or Dr. Radice attended Grand Rounds or WGS meetings as agents of G&R. App. at 30a. Neither of these determinations were challenged or disturbed by *Bourdin II*. And because they were not, there is no evidence to trigger subsection (a)(4)'s application to G&R.

II. *Bourdin II*'s Interpretation and Application of the District's Long-Arm Statute to the Defendants Is Unconstitutional Because It Permits the Assertion of Specific Jurisdiction When Plaintiff's Claim Does Not Relate to the Defendant's Purposeful Contact with the Forum

The application of D.C. Code § 13-423(a)(4) to the defendants violates the Due Process Clause because it permits the exercise of specific personal jurisdiction over them despite the fact that their only purposeful contact with the forum bears no relation to the plaintiffs' cause of action.[11] As stated above, due process requires that the assertion of specific jurisdiction be based on the defendant's purposeful contact with the forum from which plaintiff's claim arose.

Bourdin II held that, under D.C. Code § 13-423(a)(4), the doctors' only purposeful contact with the District—their "persistent course of conduct" in periodically attending Grand Rounds and WGS meetings—need not relate to the plaintiffs' claim. It reached this holding because it reasoned the due process requirement that the defendant's act relate to the plaintiff's claim[12] "is subsumed in the requirement

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11. D.C. Code § 13-423(a)(4) authorizes the assertion of personal jurisdiction where the plaintiff's claim arises from the defendant's "causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he . . . engages in any other persistent course of conduct . . . in the District of Columbia."

12. The constitutional due process requirement is embodied in D.C. Code § 13-423(b). *See Shoppers Food*

(Cont'd)

that the 'claim for relief aris[e]' from an act or omission outside the forum that 'caus[es] tortious injury in the District of Columbia." App. at 19a-20a (alterations in original). *Bourdin II* determined that this due process requirement was fulfilled here by what happened during Mrs. Bourdin's telephone call: "There is no doubt that appellants' claims arose out of the doctors' allegedly tortious acts or omissions in Virginia . . . . [T]he first time that the doctors were negligent arguably was when they failed to advise her properly when she called them from the District." App. at 18a, 18a n.8 (internal emphasis and quotations omitted). Thus, the court concluded it would be "redundant" to require that the persistent course of conduct relate to plaintiffs' claims "when a direct link is already established between the tortious conduct outside the District and the resulting injury within the jurisdiction on which the claim is based." App. at 20a.[13]

But because the court concluded that the doctors' purposeful in-forum "persistent course of conduct" need not relate to plaintiffs' claims, it was forced to find such

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(Cont'd)

Warehouse v. Moreno, 746 A.2d 320, 326 (D.C. 2000); *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 158 (D.C. 1978). Since *Shoppers*, the District of Columbia courts have used "nexus" to refer to the relationship between the plaintiff's claim and the defendant's contacts required by the long-arm statute and the Due Process Clause.

13. *Bourdin II* adopted the analysis in *Crane v. Carr*, 814 F.2d 758, 763-64 (D.C. Cir. 1987). App. at 22a-23a. *Crane* held that the persistent course of conduct requirement was a "plus factor" that need not relate to plaintiff's claim.

a due process "link" in Mrs. Bourdin's telephone call. In doing so, it effectively held that D.C. Code § 13-423(a)(4) can subject a defendant to personal jurisdiction on the basis of his non-purposeful contacts with the District because such non-purposeful contacts relate to plaintiff's claim, and satisfy due process, when they cause injury in the District. Such an application of D.C. Code § 13-423(a)(4) does not comport with due process because it subjects defendants to specific personal jurisdiction when plaintiffs' claims bear no relationship to their purposeful contacts.

To be fair, *Bourdin II*'s interpretation of D.C. Code § 13-423(a)(4) may comport with due process where a defendant's purposeful contact with the forum constitutes an affirmative tortious act[14] causing injury in the District.[15] But in this case, the alleged tortious act did not originate from defendants' purposeful contact with the District. It originated from the in-forum contact *plaintiff initiated* when she called defendants'

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14. As opposed to a passive tortious omission or failure to act arising from non-purposeful contact with the forum, which is what happened in this case.

15. *See , e.g., First Am. First, Inc. v. Nat'l Assoc. of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986) (concluding that defendant's conduct in a defamation action was "purposefully directed" at the forum state where the "allegedly defamatory letters, though written in and mailed from Illinois and distributed throughout the country, were nevertheless directed in their intended effect at the activities in Virginia of Virginia residents" and consequently the defendant "knew or should have known [they] would inflict the greatest injury upon [the plaintiff] in the state in which he resided and conducted his business").

Virginia office from the District. Under these circumstances, which demonstrate a lack of purposeful contacts giving rise to plaintiffs' claims, the Due Process Clause prohibits the exercise of specific personal jurisdiction over the defendants.

Thus, D.C. Code § 13-423(a)(4), as interpreted by *Bourdin II* and applied to the defendants, contravenes the Due Process Clause. *Bourdin II* should therefore be reversed, and the case dismissed for lack of personal jurisdiction.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari to the District of Columbia Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DECIDED OCTOBER 22, 2009

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 05-CV-1059

ALICIA M. ETCHEBARNE-BOURDIN, ET AL.,

APPELLANTS,

v.

LUIS C. RADICE, ET AL.,

APPELLEES.

Appeal from the Superior Court of the
District of Columbia
(CA-12359-93)

(Hon. Noël Anketell Kramer, Trial Judge)

(Argued April 4, 2007 Decided October 22, 2009)

Before RUIZ and BLACKBURNE-RIGSBY, *Associate Judges*, and SCHWELB, *Senior Judge*.

RUIZ, *Associate Judge*: This case, now before us for a second time, requires us to interpret the District of Columbia's "long-arm" statute, D.C. Code § 13-423 (2001). The issues before us concern two subsections of the statute which authorize District of Columbia courts

to exercise jurisdiction over non-resident defendants who "transact[] any business" in the District of Columbia, D.C. Code § 13-423(a)(1); or who "caus[e] tortious injury in the District of Columbia by an act or omission outside of the District of Columbia if [they] regularly do[] or solicit[] business, engage[] in any other persistent course of conduct, or derive[] substantial revenue from goods used or consumed, or services rendered, in the District of Columbia." *Id.* at § (a)(4). When the conduct of a defendant satisfies either one of these sections, the court may exercise personal jurisdiction only if "a claim for relief aris[es] from acts enumerated in [the statute]." *Id.* at § (b). Specifically, we address for the first time whether all of the requirements set out in subsection (a)(4) must be linked to the claim for relief in a particular case, to permit the exercise of personal jurisdiction. We hold that the nexus requirement under subsection (b), as applied to the basis for jurisdiction set out in subsection (a)(4), does not require that the claim arise from what we consider to be independent "plus factors." These factors (e.g., a "persistent course of conduct" in the District of Columbia), are required for the purpose of ensuring that exercising jurisdiction over a defendant where the claim for relief is based on conduct outside the forum comports with due process. Because the trial court thought otherwise, and on the basis that there was no nexus between the defendant's persistent course of conduct in the District and the medical malpractice action, dismissed the complaint for lack of jurisdiction over appellees, we reverse the judgment and remand the case for further proceedings.

Appendix A

I. Factual Background

This action arises from a complaint for medical malpractice filed by appellants, Alicia Etchebarne-Bourdin and, her husband, Mauricio Bourdin. They claim that appellees, Drs. Luis Radice and Edward Gahres, and their practice, Gahres and Radice, M.D.s, Ltd., provided negligent medical care to Ms. Etchebarne-Bourdin that resulted in the death *en ventre sa mere* of her unborn child.

The facts of the case relevant to the question of jurisdiction are, for the most part, undisputed. At the time of the complaint, appellants were both domiciled in Virginia, and worked at the International Monetary Fund ("IMF"), located in the District. In 1990, Ms. Etchebarne-Bourdin became Dr. Radice's patient. Although Dr. Radice was listed in a directory of local physicians made available at the IMF Health Center, Ms. Etchebarne-Bourdin did not consult the directory in choosing Dr. Radice as her physician; rather, she was referred to the doctor by her sister, who had been his patient in the past.

Drs. Radice and Gahres specialized in obstetrics and gynecology and their office was located in Virginia at the time Ms. Etchebarne-Bourdin became their patient. Their practice, Gahres and Radice M.D.s, Ltd., is a Virginia professional corporation. The doctors had maintained a practice in the District of Columbia, from 1970 until 1988, two years before Ms. Etchebarne-Bourdin became their patient. In 1988, the doctors, at

the urging of their medical malpractice insurance carrier, closed their office in the District and relinquished their admitting privileges at D.C. hospitals.

Even after they moved their office to Virginia, the doctors maintained ties to the District of Columbia. The doctors are individually licensed in the District as well as in Virginia. They maintained a listing for their office, with their Virginia address, in the District of Columbia Yellow Pages. The doctors regularly attended Grand Rounds of George Washington University Hospital — more than once a month — and were members and attended meetings of the Washington Gynecological Society, which met in the District of Columbia approximately eight times a year.[1] The trial court found that 5.5% of the doctors' patients were residents of the District.[2]

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1. The trial court found that the doctors attended the meetings at Washington Gynecological Society and Grand Rounds at George Washington University Medical Center to continue their medical education. According to the trial court's order on remand, "it appears that Grand Rounds involved reviewing case histories of patients, as well as topics related to the practice of gynecology and obstetrics."

2. In their brief on appeal, appellants offered additional facts relating to the doctors' contacts with the District that they claim the trial court failed to consider. An appellate court will not ordinarily consider facts outside the record. *See Maldonado v. Maldonado*, 631 A.2d 40, 41 n.1 (D.C. 1993) (refusing to consider facts contained in appellee's brief that were not part of the record).

Appendix A

On October 29, 1990, while driving in the IMF parking lot in the District, appellants were "rear-ended" in an automobile collision. Ms. Etchebarne-Bourdin was then seven months pregnant. Later that day, Ms. Etchebarne-Bourdin telephoned Dr. Radice's office in Virginia from her office at the IMF in the District. She explained what had happened to the receptionist who answered the telephone; the receptionist advised her to keep her regular appointment on November 2nd, four days later.[3]

According to appellants' complaint, at her next two appointments, on November 2nd and November 9th, Ms. Etchebarne-Bourdin complained to Dr. Radice that she continued to feel general discomfort and expressed concern of "decreased intrauterine movement." No tests were conducted at either visit, but at both times she was assured that nothing was wrong. On November 9th, Dr. Gahres ascribed Ms. Etchebarne-Bourdin's complaints to the fact that "you women all get crazy during your last weeks of pregnancy."

On November 16, 1990, Ms. Etchebarne-Bourdin felt pain and had an unusual vaginal discharge. She immediately went to appellees' office for an examination. During the examination, Dr. Radice could not detect any

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3. The doctors' office records showed that Dr. Radice was in the office for part of the day when Ms. Etchebarne-Bourdin called. Although he did not remember directing the receptionist to advise Ms. Etchebarne-Bourdin not to seek immediate medical care, he did not deny that it was possible that he did.

fetal movement. He rushed her to Alexandria Hospital, where he delivered a still-born baby.

Appellants filed a complaint in D.C. Superior Court for medical malpractice. They alleged that appellees breached the standard of care by failing to advise Ms. Etchebarne-Bourdin, after she notified them that she had been in a car accident, that she should be examined immediately for signs of fetomaternal injury and that they failed to do so during her office visits. As appointed legal representatives of the child's estate, appellants brought a survival action under D.C. Code § 12-101 (1981), seeking damages in the amount of $ 12,003,500, reflecting $ 12 million for the estate of the child had she lived her expected life span, and $ 3,500 for medical and funeral expense. Appellants also claimed on their own behalf. In connection with that claim, appellants sought combined damages of $ 6 million: $ 4 million for Ms. Etchebarne-Bourdin's physical injury, emotional distress, and loss of wages, and $ 2 million for her husband's loss of consortium. Appellees moved to dismiss for lack of jurisdiction under Superior Court Civil Rule 12(b)(2), or, in the alternative, on the grounds of *forum non conveniens*. The trial court granted appellees' motion to dismiss for lack of personal jurisdiction, and did not rule on the alternative motion.

The trial court concluded that it did not have personal jurisdiction over appellees, and granted their motion to dismiss. On appeal, we reversed and remanded the case for renewed consideration in light of our then-recent decision in *Shoppers Food Warehouse v. Moreno*,

746 A.2d 320 (D.C. 2000) (en banc), *cert. denied*, 530 U.S. 1270, 120 S. Ct. 2737, 147 L. Ed. 2d 997 (2000). *See Etchebarne-Bourdin v. Radice*, 754 A.2d 322 (D.C. 2000) ("*Etchebarne-Bourdin I*").

On remand, the trial court again dismissed the suit for lack of personal jurisdiction, determining that appellees had neither transacted business in the District of Columbia within the meaning of subsection (a)(1) of the long-arm statute, nor did their "persistent course of conduct" in the District sufficiently relate to appellant's claimed injury, as the trial court interpreted subsection (a)(4) to require. We agree with the trial court's analysis that appellees did not "transact business" under D.C. Code § 13-423(a)(1), but conclude that the trial court erred in its analysis of the nexus required by subsection (a)(4). We, therefore, reverse and remand the case for further proceedings.

II. Analysis

When reviewing an order of dismissal for lack of personal jurisdiction where there has not been an evidentiary hearing, the court "must resolve in . . . favor of [the party asserting jurisdiction] all disputes concerning relevant facts presented in the record." *Reuber v. United States*, 242 U.S. App. D.C. 370, 383, 750 F.2d 1039, 1052 (1985) (quoting *Nelson v. Park Industries, Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983)). *See* Super Ct. Civ. R. 12 (c) (providing that motion for judgment on the pleadings is converted to motion for summary judgment if "matters outside pleadings are

presented to and not excluded by" the trial court). We review *de novo* the trial court's dismissal of a complaint for "lack of jurisdiction over the person" under Rule 12 (b)(2). *See Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001).

A. *The Long Arm Statute's Requirements*

The District of Columbia's long arm statute provides as follows:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or

> consumed, or services rendered, in the District of Columbia;
>
> (5) having an interest in, using, or possessing real property in the District of Columbia;
>
> (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; or
>
> (7) marital or parent and child relationship in the District of Columbia . . . [under certain conditions; this subsection is not relevant to this case]
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

D.C. Code § 13-423 (2001).

To assert personal jurisdiction under § 13-423, the statute sets out two separate requirements: first, the defendant must have engaged in one of seven enumerated activities, *id.* at § (a), and, second, "[the] claim for relief [must] aris[e] from acts enumerated" in

the statute. *Id.* at § (b). In this case, two of the enumerated acts are at issue: whether appellees "transact[ed] any business in the District of Columbia," *id.* at § (a)(1), and whether they "caus[ed] tortious injury in the District of Columbia by an act or omission outside the District of Columbia if [they] . . . engage[] in any other persistent course of conduct . . . in the District of Columbia." *Id.* at § (a)(4).

In a long and detailed order, the trial court considered four contacts by the doctors with the District of Columbia: (1) Ms. Etchebarne-Bourdin's telephone call to appellees from the District on October 29, 1990; (2) the District of Columbia medical licenses held by Drs. Gahres and Radice; (3) the listing for the doctors' Virginia practice in the District of Columbia Yellow Pages, as well as Dr. Radice's listing in a referral list at the IMF Health Center (in the District); and (4) the doctors' periodic attendance at meetings of the Washington Gynecological Society and Grand Rounds at George Washington University Medical Center, all of which took place in the District of Columbia. The trial court determined that, whether viewed individually or in the aggregate, appellees' contacts with the District did not constitute "transacting any business" under the statute, and that, even assuming they did, appellants' claim did not "aris[e] from" those business transactions. *See* D.C. Code § 13-423(b). Similarly, the trial court determined that even though the doctors' attendance at Grand Rounds and Society meetings constituted a "persistent course of conduct" under D.C. Code § 13-423(a)(4), this conduct, also, failed to satisfy the "aris[e] from" requirement of the statute. *Id.* at § (b).

Appendix A

B. *"Transacting any business," D.C. Code § 13-423 (a)(1)*

We have held that "the sweep of the 'transacting any business' provision [of the District's long-arm statute] covers *any transaction of business in the District of Columbia* that can be reached jurisdictionally without offending the Due Process Clause." *Holder*, 779 A.2d at 270 (quoting *Mouzavires v. Baxter*, 434 A.2d 988, 993 (D.C. 1981) (en banc) (per curiam)).

By equating the "transacting business" requirement with what is permissible under the Due Process Clause, we have required that plaintiff show only that the defendant has had "minimum contacts" with the forum — "purposeful, affirmative activities within the District of Columbia," — so that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Shoppers*, 746 A.2d at 330-31 (citations omitted). Therefore, in order to demonstrate that appellees "transacted business" within the meaning of the statute, appellees must be "purposefully engaged in some type of . . . activity directed at District residents." *Holder*, 779 A.2d at 270-71 (citing *Shoppers*, 746 A.2d at 330-31).

Applying this standard, we agree with the trial court that the telephone call that Ms. Etchebarne-Bourdin placed to appellees' office on October 29, 1990, cannot — consistent with the limits of due process — serve as a basis for jurisdiction. *See Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (holding

that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State").[4] *Cf.* D.C. Code § 13-423(a)(4), discussed *infra*, Part II A.

Likewise, that the doctors maintained medical licenses to practice in the District cannot, without more, serve as a basis for jurisdiction under the "transacting any business" subsection of the statute. *See Ghanem v. Kay*, 624 F. Supp. 23, 25 (D.D.C. 1984) ("[I]t is actual practice of a profession . . . and not the possession of the right to practice that brings a person within the jurisdiction of a . . . court.") (quoting *Lebkuecher v. Loquasto*, 255 Pa. Super. 608, 389 A.2d 143, 145 (1978))). Appellants' reliance on *Presbyterian Univ. Hosp. v. Wilson*, 337 Md. 541, 654 A.2d 1324 (Md. 1995), for the proposition that by submitting themselves to the licensing process, the doctors were manifesting a deliberate and voluntary association with the forum is misplaced. In *Presbyterian*, the Maryland Court of Appeals exercised personal jurisdiction over a hospital located in Pennsylvania because the hospital (1) had

4. Appellants argue on appeal that appellees should have foreseen that some of their patients would call from the District, pointing to Dr. Radice's admission at his deposition that other patients called to ask to have their prescriptions filled, and that he had placed calls to pharmacies in the District. We need not consider this argument as it is raised for the first time on appeal. *See, e.g., Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("[P]oints not asserted with sufficient precision [at the trial court level] to indicate distinctly the party's thesis will normally be spurned on appeal." (quoting *Miller v. Avirom*, 127 U.S. App. D.C. 367, 369-70, 384 F.2d 319, 321-22 (1967)).

purposefully availed itself of Maryland's laws by actively registering as a healthcare provider with a state-run program that provided indigent healthcare; (2) was the only approved adult liver transplant center for patients of that Maryland program; and (3) solicited Maryland residents to seek treatment at the hospital.[5] *See Presbyterian*, 654 A.2d at 1331-32. Here, by contrast, there is no allegation that the doctors maintained their D.C. licenses in order to solicit patients in the District.

Appellants claim that the doctors' regular attendance at periodic meetings of the Washington Gynecological Society and Grand Rounds at George Washington University Hospital constituted "transacting business" in the District for purposes of the long-arm statute. We agree with the trial court that these activities, which were primarily for continuing professional education, fall outside the meaning of "transacting business."[6] Even if we accept appellants' assertion that the training and continuing medical education that the doctors received served to some extent to attract patients, including those residing in the District of Columbia, appellants' malpractice actions

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5. In *Presbyterian*, the Pennsylvania hospital applied to the Maryland Department of Health & Mental Hygiene to be certified as a Medicaid provider to Maryland residents. 654 A.2d at 1331.

6. These activities did serve, however, as the basis for the trial court's conclusion that appellees engaged in a "persistent course of conduct." See *infra*, Part II C.

cannot be said to "arise from" the doctor's attendance at these meetings.

Appellees' listings in the District of Columbia Yellow Pages and at the IMF Satellite Unit as a healthcare provider present a closer issue. As an initial matter, we do not agree with the trial court's conclusion that "there is no indication that [the Yellow Pages or IMF listings] were designed to, or particularly likely to, attract District of Columbia residents." To the contrary, the District of Columbia Yellow Pages, by their very design, are intended to reach District residents. The listing of Dr. Radice at the IMF as a healthcare provider, on the other hand, was not specifically designed to reach District residents as much as to be a resource to all employees, wherever they live.

But unlike the "extensive" weekly full-page newspaper advertisement in *The Washington Post* we considered in *Shoppers Food Warehouse*, 746 A.2d at 330, appellees' entry in the Yellow Pages is simply a listing, with only the names of the doctors, their address and phone number in Virginia, and their medical specialty.[7] Dr. Radice's listing at the IMF contained

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7. In contrast, in *Shoppers Food Warehouse*, we described the advertisement as being targeted to District consumers:

> The body of the ads contained a description of the product for sale in bold letters with the price, and sometimes with a picture of the sale item. At the top of the ad some additional inducement to shop at

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similar biographical and contact information, and, even though the directory was located at the IMF's health unit in the District, it did not reach out to solicit patients who lived in the District of Columbia, rather than persons who worked at the IMF. The scale and scope of the doctors' advertising, in other words, did not rise to the level of active solicitation of patients in the District we deemed significant in *Shoppers*; Ms. Etchebarne-Bourdin herself did not select Dr. Radice from either of these sources, but on her sister's recommendation. *See Ghanem*, 624 F. Supp. at 25 n.6 ("[W]here the physician has not aggressively sought patients in the forum and the plaintiff did not consult defendant as a result of forum activities by the defendant . . ., possession of a license (and a listing in the forum jurisdiction's phone book) without practicing in the forum is not sufficient to meet the due process requirements that limit jurisdiction under all long-arm statutes."). The limited reach of appellees' "advertising" activities is underscored by the fact that although they were located within the Washington metropolitan area, only 5.5% of appellees' patients were District residents. *Cf. Shoppers Food Warehouse*, 746 A.2d at 332 ("The Metropolitan

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(Cont'd)

> Shoppers appeared. . . . In the middle of one of the pages . . . Shoppers stated in bold letters: "**No Matter Where You Live . . . It's Worth The Drive!**" . . . The record before us reveals that Shoppers also placed advertisements on television networks in the District, as well as listed one of its stores in the Yellow Pages . . . .

746 A.2d at 330.

Washington, D.C. area functions, in many respects, as a unified legal and commercial community. Consequently, 'when out-of-state actors avail themselves of the benefits of contact within the forum jurisdiction,' . . . 'fairness requires that they be held accountable therein for the consequences of such activities.'"). Since appellees did not actively solicit patients in the District, but rather maintained passive listings of contact information, it would be unfair to infer that Drs. Gahres and Radice should have anticipated being subject to suit in the District of Columbia as a result of having their contact information in Virginia listed here.

We therefore agree with the trial court that appellees did not "transact business" in the District of Columbia for purposes of D.C. Code § 13-423(a)(1).

C. *Causing tortious injury in D.C. and "Persistent course of conduct," D.C. Code § 13-423(a)(4)*

When we remanded the case in *Etchebarne-Bourdin I*, we directed the trial court that, in the event it did not find jurisdiction under subsection (a)(1), it should "reevaluate whether the defendants caused 'tortious injury in the District' resulting from 'an act or omission outside the District,' in the context of the 'nexus' requirement as articulated in *Shoppers Food Warehouse*, which applies equally to all subsections of section 13-423(a)." 754 A.2d at 327. In its first order dismissing the case, the trial court had found that for purposes of subsection (a)(4), appellees had engaged in a "persistent course of conduct" in the District of

Columbia based on their participation in Grand Rounds at GWU Hospital and attendance at meetings of the Washington Gynecological Society. *Etchebarne-Bourdin I*, 754 A.2d at 326. Appellees did not contest that determination before the trial court on remand (nor do they do so on appeal). The trial court maintained this determination in its order on remand, but interpreted the statute as requiring that there must be a sufficient connection between the claim made by appellants in their lawsuit and appellees' persistent course of conduct in the District. We disagree with the trial court and conclude that where the tortious act is alleged to have caused injury in the District of Columbia, and the claim arises from such act and injury, no additional nexus need be shown between the claim and the persistent course of conduct.

The pertinent sections of the District of Columbia long-arm statute, D.C. Code § 13-423, provide:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's . . . (4) *causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct*, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
>
> . . . .

> (b) When jurisdiction over a person is based solely upon this section, *only a claim for relief arising from acts enumerated in this section may be asserted against him.*

D.C. Code § 13-423(a)(4), (b) (2001) (emphasis added).

By its plain language, subsection (a)(4) contemplates that personal jurisdiction can be exercised for "a claim for relief [that] aris[es] from the person's . . . causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia . . . ." *Id.* at § (a)(4). Subsection (a)(4) further requires that jurisdiction can be exercised over appellees only if they also have an additional contact with the District, in this case, if they "engage[] in any other persistent conduct . . . in the District of Columbia." *Id.*

There is no doubt that appellants' claims arose out of the doctors' allegedly tortious acts or omissions in Virginia, which are alleged to have caused injury to Ms. Etchebarne-Bourdin in the District.[8] But subsection (b)

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8. In *Etchebarne-Bourdin I*, we stated that "[t]o the extent that the pregnancy began to be imperiled at the time as a result of the unmonitored and untreated physical impact on October 29, 1990, Ms. Bourdin's original injury occurred while she was in the District of Columbia." 754 A.2d at 327-28. We explained this was because "the triggering event, the automobile collision, occurred in the District of Columbia, and that the first time that the *doctors were negligent* arguably was when they failed to advise her properly when she called them from the District."

(Cont'd)

of the long-arm statute also appears to require an independent "nexus requirement," and provides that "only a claim for relief arising from acts enumerated in this section may be asserted against [defendant]." The issue before us is whether, specifically in connection with jurisdiction grounded on subsection (a)(4), the "acts enumerated" that are referred to in subsection (b) for which a nexus must be shown are the acts "causing tortious injury in the District of Columbia," or also include the further limiting requirements, such as "engag[ing] in any other persistent conduct . . . in the District of Columbia." *Id.* at § (a)(4). As we explain below, we conclude that, for purposes of subsection (a)(4), subsection (b)'s nexus requirement is subsumed in the requirement that the "claim for relief aris[e]" from an

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Id. at 327 (emphasis added). We based this inference on the guidelines that appellees' medical practice had in place at the time the seven-months-pregnant Ms. Etchebarne-Bourdin called to say she had been in a car accident. The doctors' office guidelines for screening telephone calls provide that "[i]f an OB patient is involved in an accident or injured in any way, she must be examined in an emergency room or our office immediately." These instructions suggest that if a patient is not seen immediately after an accident, there is a possibility that the fetus or the pregnant woman might suffer some injury.

The trial court accepted our analysis on remand, and appellees did not contend otherwise on remand nor have they done so on appeal. But even if they had, this would be a disputed fact that would have to be resolved in favor of appellants. *See Reuber*, 242 U.S. App. D.C. at 383, 750 F.2d at 1052.

act or omission outside the forum that "caus[es] tortious injury in the District of Columbia." D.C. Code § 13-423 (a)(3).

Although the language of the statute could be read literally to require a further nexus with the claim, we think it would be redundant when a direct link is already established between the tortious conduct outside the District and the resulting injury within the jurisdiction on which the claim is based. As we have observed with respect to personal jurisdiction grounded on "transacting business" under § 13-423(a)(1), "[t]he limitation in § 13-423(b) that the claim for relief must arise from the transaction of business in the District of Columbia is meant to prevent the assertion of claims in the forum state that do not bear some relationship to the acts in the forum stated relied upon to confer jurisdiction." *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 158 (D.C. 1978) (citation omitted). This narrow reading of subsection (b)'s nexus requirement as a due process safeguard is consistent with "Congress's intent to provide the District of Columbia with a long arm statute equivalent in scope to those already in effect in Maryland and Virginia," the courts of which had interpreted their statutes to "permit the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause of the United States Constitution." *Envtl. Research Int'l, Inc. v. Lockwood Greene Eng'r, Inc.*, 355 A.2d 808, 810-11 (D.C. 1976).

The provenance of the District's long-arm statute also informs our understanding that the additional activities listed in subsection (a)(4) are "plus factors" intended to ensure that there are minimum contacts with the forum sufficient to satisfy due process concerns. The District of Columbia's long-arm statute is modeled after the Uniform Interstate and International Procedure Act. *See Cohane*, 385 A.2d at 159 (citing *Founding Church of Scientology, Etc. v. Verlag*, 175 U.S. App. D.C. 402, 405, 536 F.2d 429, 432 (1976)). The Commissioners' Note accompanying subsection (a)(4) of the uniform act states that it "authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is *some other reasonable connection between the state and the defendant*." 9B U.L.A. 310 (1966) (Commissioners' Note), *quoted in Margoles v. Johns*, 157 U.S. App. D.C. 209, 213, 483 F.2d 1212, 1216 (1973) (emphasis added). In drafting the uniform act, it was the Commissioners' intent to "require[] something more than the in-forum impact at issue in the litigation, to exclude cases in which that impact is an isolated event and the defendant otherwise has no, or scant, affiliations with the forum." *Steinberg v. Int'l Criminal Police Org.*, 217 U.S. App. D.C. 365, 369, 672 F.2d 927, 931 (1981) (citing 13 U.L.A. at 468-69 (1980) (Commissioners' Comment)); *see Founding Church of Scientology*, 175 U.S. App. D.C. at 405, 536 F.2d at 432.

Appendix A

In *Crane v. Carr*, 259 U.S. App. D.C. 229, 814 F.2d 758 (1987), a case in which a District resident brought libel and "false light" actions against the New York Zoological Society ("NYZS") for allegedly defaming him in a letter, the court reversed the trial court's dismissal of a suit against NYZS for lack of personal jurisdiction. *Id.* at 234-35, 814 F.2d at 763-64. The court held that the "persistent course of conduct" or "plus factor" required by subsection (a) (4) of the D.C. long-arm statute need not be related to the claim. *Id.* at 234, 814 F.2d at 763. Noting that NYZS' letter, sent to Belize, was the allegedly tortious act outside the District that caused injury to the plaintiff who resided in the District,[9] the court remanded the case to allow discovery on the extent of NYZS' contacts with the District. *See id.* at 235, 814 F.2d at 764. In doing so, then-Judge Ruth Bader Ginsburg noted:

> To recapitulate, under (a)(4), the act outside/*impact inside* the forum is the basis for drawing the case into the court, but because the harm-generating act (or omission) occurred outside, the statute calls for something more. The "something more" or "plus factor" does not itself supply the basis for the assertion of jurisdiction, but it does serve to filter out cases in which the inforum

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9. In defamation actions, the injury is deemed to occur where the defamed person is located. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984).

> impact is an isolated event and the defendant otherwise has no, or scant, affiliations with the forum.

Id. at 234, 814 F.2d at 763.[10]

We agree with and adopt the court's analysis in *Crane*. The enumerated acts, from which the claim must "arise," D.C. Code § 13-423(b), are the specific acts (e.g., transacting business, contracting to supply services, having an interest in real property) or impact in the forum (causing tortious injury) that could result in an individual being subject to personal jurisdiction in our courts. The claim need not arise, however, from the "plus factors" that are imposed by subsection (a)(4) on those claim-related acts or omissions. They are an additional due process safeguard, such as the requirement of "persistent course of conduct," to ensure that the party being haled into this jurisdiction's courts has more than a "scant" connection to the forum. *Id.* A useful comparison is provided by subsection (a)(3), which establishes personal jurisdiction over a non-resident defendant if both the tortious act and the injury

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10. *See also Steinberg*, 217 U.S. App. D.C. at 369, 672 F.2d at 931 (interpreting D.C. Code § 13-423, and reversing the trial court's order dismissing the case for lack of personal jurisdiction where plaintiff alleging defamation resided in, and claimed injury in, the District, reasoning that while Interpol's regular transmissions from France to U.S. government offices in the District did "not add up to 'doing business' here, [they] suffice[d] to supply the 'something more' subsection (a)(4) requires").

occur in the District. In such a situation, the statute does not require additional "plus factors" to meet the due process minimum contacts requirement.

Applying the correct interpretation of D.C. Code § 13-423(a)(4), that we now announce, the trial court had personal jurisdiction over appellees to consider appellants' claims of medical malpractice for injury suffered in the District of Columbia as a result of an allegedly tortious act or omission outside this forum.

We reverse the judgment of the trial court dismissing the action for lack of personal jurisdiction over appellees and remand the case for further proceedings consistent with this opinion.

So ordered.

APPENDIX B — ORDER OF THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED JULY 29, 2005

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 12352-93
Cal. 12
Judge Kramer

ALICIA M. ETCHEBARNE-BOURDIN AND MAURICIO BOURDIN, ADMINISTRATORS OF THE ESTATE OF BABY GIRL ETCHEBARNE-BOURDINE, et al.,

Plaintiffs

v.

LUIS C. RADICE, M.D., et al.,

Defendants

ORDER

This matter is before the court on remand from the Court of Appeals for reconsideration of the court's Amended Order of June 6, 1996 (hereafter "Amend. Ord.") granting the defendants' motion to dismiss for lack of personal jurisdiction (referred to hereafter as

the "remand decision").[1] *See Etchebarne-Bourdin v. Radice*, 754 A.2d 322, 323 (D.C. 2000). In the remand decision, the Court of Appeals directed this court to reconsider whether the District of Columbia can exercise personal jurisdiction over the defendants under the provisions of the District's long-arm statute which permit foreign defendants to be sued if they "transact[] any business" in the District of Columbia, D.C. Code Section 13-423(a)(1), or "caus[e] tortious injury in the District of Columbia by an act or omission outside the District of Columbia," Section 13-423(a)(4). *Etchebarne-Bourdin*, 754 A.2d at 327-28.

Both sides have had an opportunity to supplement their previous filings to address the issues to be resolved on remand. With the guidance provided by the remand decision, the court has reconsidered its previous conclusions. In doing so, the court has relied on the factual findings set out in its original 62-page Amended Order dismissing the complaint for lack of personal jurisdiction (a copy of which is attached hereto). As the Court of Appeals noted, "The facts of the underlying case related to the question of personal jurisdiction are,

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1. Unfortunately, this matter appears to have been lost in the transition from the Court of Appeals, to the Civil Division, to this court. At one point following the Court of Appeals decision, the court's staff attempted to ascertain the status of the case and was informed that the matter was no longer pending. With that information, the court concluded that the matter must have been resolved between the parties. Only when counsel called chambers to determine the status of the case did the court learn that the case was unresolved.

for the most part, undisputed." *Id.* at 324. Rather, it is "the legal consequences of those facts with respect to personal jurisdiction" with which the parties disagree. *Id.*

FACTUAL BACKGROUND

The Defendants

As set forth in the court's Amended Order, the defendants in the current case are Dr. Luis Radice, Dr. Edward Gahres and Gahres & Radice, M.D.'s, Ltd. (G & R, Ltd.), a professional corporation organized under the laws of Virginia with its principal place of business in Virginia. The doctors specialize in obstetrics and gynecology.

In 1990, at the time of the events at issue here, both doctors were residents of Virginia. They treated patients solely in Virginia, either at their medical office in Alexandria, Virginia, or at the Alexandria Hospital — the only hospital with which they had an active affiliation. Amend. Ord. at 10. At the urging of their malpractice insurer, the defendants had closed their District of Columbia office two years before the events at issue here and had given up their admitting privileges at District hospitals. Amend. Ord. at 9-10.[2]

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2. There was evidence that the defendants have actually sought to discourage the business of District residents insured by Blue Cross/Blue Shield of the National Capitol Area (BCBSNCA) by failing to disclose their D.C. medical licenses on insurance forms they submitted to BCBSNCA. *See* discussion, Amend. Order at 23-24.

Appendix B

From January 1990 to January 1992, only 205, that is, 5.5 % of their 3,742 patients were D.C. residents. Amend. Ord. at 10. Most of the defendant's patients who were D.C. residents at that time were a part of the group that formerly had gone to their office in the District and had no objections to traveling to the defendant's Virginia office. Amend. Ord. at 20. Other District of Columbia patients had sought them out for treatment as a result of "word of mouth." Amend. Ord. at 20.

At the time of the events leading to this lawsuit, both Dr. Gahres' and Dr. Radice's names were listed in the Yellow Pages of the District of Columbia phone book. Amend. Ord. at 21-22. Those listings provided their names, the area of their medical specialty, and their Virginia office address and phone number. *Id.* In addition, Dr. Radice was listed at the satellite unit of the International Monetary Fund's (IMF's) Health Service. Amend. Ord. at 21. That IMF listing gave his office address in Virginia and related that he had graduated from medical school in 1957, that he was fluent in Spanish, that he was in practice with Dr. Gahres, that he was affiliated with the Alexandria Hospital, and that he required payment at the time of the office visit. Amend. Ord. at 21. There is no claim that any plaintiff saw either the Yellow Pages or IMF listing. Amend. Ord. at 21-22.

The record indicated that from September 1991 and to February 1994, a total of thirty months, Dr. Gahres attended Grand Rounds at George Washington Hospital

in the District of Columbia fifty-four times (1.8 times a month), and Dr. Radice attended Grand Rounds thirty-two times (1.1 times a month). Amend. Ord. at 16. Although never clearly described by the plaintiffs, it appears that Grand Rounds involved reviewing case histories of patients, as well as topics related to the practice of gynecology and obstetrics. Amend. Ord. at 14-16. After considering the information about Grand Rounds, the court concluded that Dr. Gahres and Dr. Radice attended Grand Rounds for the sole purpose of continuing medical education. There is no indication that they received any remuneration from this activity, nor that they taught students or evaluated patients at Grand Rounds. Amend. Ord. at 14-15.

Both Dr. Gahres and Dr. Radice were long-time members of the Washington Gynecological Society. The group held about six to eight meetings a year, usually in a location within the District of Columbia. Both Dr. Gahres and Dr. Radice tried to attend regularly, which, assuming they attended seven times a year and that all of those meetings were in the District, would average out to 0.6 times a month. As with Grand Rounds, they attended these meetings for the purpose of continuing medical education. The Society's members came from Virginia and Maryland, as well as from the District of Columbia. Amend. Ord. at 20.

Combining the visits to the District of Columbia for Grand Rounds and the Washington Gynecological Society, and assuming that each doctor made seven of the eight meetings, Dr. Gahres came into the District of

Columbia for continuing medical education purposes 2.4 times a month and Dr. Radice 1.7 times a month. There was no evidence provided to the court that either doctor conducted these activities as an agent of G&R, Ltd.

The Plaintiffs

At all times here relevant, the plaintiffs have been residents of Virginia. Amend. Ord. at 4. Upon referral from her sister-in-law, Alicia Etchebarne-Bourdin became a patient of Dr. Gahres and Dr. Radice in May 1990 when she was seven weeks pregnant. Amend. Ord. at 5. On October 29, 1990, as Mr. and Mrs. Bourdin drove from the parking lot of the International Monetary Fund building in the District of Columbia, their place of employment, they were rear-ended by another vehicle. Amend. Ord. at 6.

After this accident, Mrs. Bourdin returned to her office in the IMF and called the doctors' office in Virginia, speaking with a receptionist. Amend. Ord. at 6. In response to Mrs. Bourdin's inquiry about whether to come in immediately for a check-up, the receptionist, after checking with someone else in the office,[3] informed

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3. The staff members in the office that day were the receptionist, an insurance secretary and a nurse. Dr. Radice was only present for a portion of the day, and there was nothing that established that he was there at the time of the phone call. Dr. Gahres was not present in the office at all on that date. Thus, while the Complaint alleged that "Defendants informed plaintiff that she could 'wait' until her next pre-natal visit, then

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Mrs. Bourdin that she could wait until her next scheduled office visit on November 2nd. Amend. Ord. at 6. Mrs. Bourdin saw Dr. Gahres on November 2nd and Dr. Radice on November 9th and 16th. Amend. Ord. at 5-6. On November 16th, Mrs. Bourdin was hospitalized and the next day gave birth to a stillborn baby. Amend. Ord. at 6-7. Plaintiffs allege that, in treating Mrs. Bourdin after the accident, the doctors failed to meet the standard of care, and that the failure led to the death of the baby and to injuries suffered by Mr. and Mrs. Bourdin and the Estate.

Questions on Remand

In its Amended Order, the court examined four statutory provisions which the plaintiffs asserted gave the District of Columbia grounds for asserting jurisdiction over the defendants for this lawsuit: D.C. Code Section 13-334, the "doing business" provision, that permits the exercise of jurisdiction over corporate defendants for all purposes, sometimes referred to as the "general jurisdiction" provision, and three provisions of Section 13-423, the D.C. long-arm statute, that the plaintiffs alleged provided a basis for "specific jurisdiction:" (1) Section 13-423(a)(1) "transacting any

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scheduled for November 2, 1990, to be examined by Defendants Radice and Gahres," the court found no evidence that either doctor had so informed Mrs. Bourdin, nor that either had directed the receptionist to so inform her. Amend. Order at 6. Of course, the receptionist would have been an agent of defendant G&R, Ltd.

business in the District of Columbia;" (2) Section 13-423(a)(3), "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia," and (3) Section 13-423(a)(4), "causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if [the defendant] regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia."

In its Amended Order, the court concluded that none of those provisions provided a basis to assert jurisdiction over the defendants, and therefore granted the defendants' motion to dismiss for lack of personal jurisdiction. The plaintiffs appealed and the Court of Appeals remanded the case to this court.

The remand decision raised no issue with respect to the court's conclusion that jurisdiction did not lie under Section 13-334's "doing business" provision, nor under Section 13-423(a)(3)'s provision for "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia." Rather, in light of the decision issued after the court's Amended Order in the case of *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000), discussing at length the principles of personal jurisdiction in the District of Columbia, the Court of Appeals remanded the matter for the court's reconsideration of (1) its conclusion that the defendants were not "transacting business" in the District of

Columbia, (2) its related conclusion that, in any event, the claims for relief did not "arise out of" any business that the defendants might be transacting here, *see* Section 13-423(b); and (3) "whether the defendants caused 'tortious injury in the District resulting from 'an act or omission outside the District." *Id.* at 326-327. The court begins by re-evaluating whether the defendants, on the factual record provided, were "transacting business" here, and, if so, whether their claims can be said to have "arisen out of" that business.

LEGAL CONCLUSIONS

Section 13-423(a)(1): Transacting Business

Subsection 13-423(a)(1) of the D.C. long-arm statute reads:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —
>
> (1) transacting any business in the District of Columbia.

D.C. Code § 13-423(a)(1)(2005). Thus, two issues are presented by an assertion of jurisdiction under Section 13-423(a)(1): (1) whether a defendant is "transacting business" in the District of Columbia, and (2) if so, whether the claim asserted "arises from" the

transaction of that business. The limiting "arising from" language is found not only in the introductory phrase of the Long-Arm Statute, but also in Section 13-423(b), which reads: "When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him." D.C. Code § 13-423(b) (2005).

In analyzing whether the "transacting business" provision provided a basis of jurisdiction in this instance, the court, in its Amended Order, concluded that the "only conceivably relevant contacts for purposes of Section 13-423(a)(1) would be (1) the phone call from Mrs. Bourdin to the defendants' Virginia office on the day of the accident, (2) the listing of the doctor's name in the Yellow Pages and at the IMF Health Center, and (3) the D.C. medical licenses held by both Dr. Gahres and Dr. Radice." Amend. Ord. at 56.[4] Having examined each of those factors, and noting the weakness of each as a basis to find that the defendants were "transacting business" in the District of Columbia, the court did not ultimately decide whether, singly or combined, they would be sufficient to conclude that any of the defendant's were "transacting business" here. Rather, the court turned to what it considered the easier issue

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4. This conclusion was reached after the court had examined extensive factual assertions made by the defendants and found them to be without support in the record. As the Court of Appeals noted, "The facts of the underlying case related to the question of personal jurisdiction are, for the most part, undisputed." *Etchebarne-Bourdin*, 754 A.2d at 324.

of whether, in any event, the claims asserted here could be said to have "arisen from" those activities.[5]

In that regard, the court concluded that because Mrs. Bourdin was referred to the doctors by her sister-in-law, rather than as the result of any of the factors enumerated as purporting to show that the doctors were soliciting D.C. residents to be their patients, they could not show the necessary "arising from" nexus. Amend. Order at 60-61. It also found that even if the IMF listing had been the impetus for Mrs. Bourdin seeking out the doctors, "the court would find the connection between the listing and Mrs. Bourdin's claims too tenuous and insignificant for a finding the sufficient nexus existed." Amend. Ord. at 56-61.

The court separately found pursuant to Section 13-423(a)(4) that the defendants were "engag[ing] in [a] persistent course of conduct" in the District of Columbia through their participation in Grand Rounds and the meetings of the Washington Area Gynecological Society, a finding that was not challenged on appeal. *See Etchebarne-Bourdin*, 754 A.2d at 325. The court went on to find, however, that the plaintiffs could not make the showing required by that provision that defendants had "caus[ed] tortious injury in the District of Columbia." In the remand decision, Judge Ruiz invites

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5. The court notes that the remand decision reflects a misunderstanding that "the trial court . . . concluded that . . . the individual doctors 'transacted business' in the District . . . ." *Etchebarne-Bourdin*, 754 A.2d at 323.

the court to examine whether combining the "persistent course of conduct" factors that the court found to exist under Section 13-423(a)(4) with the "only conceivably relevant contacts" bearing on "transacting business" under Section 13-423(a)(1) would cause the court to conclude that the defendants were "transacting business in the District," an examination the court now undertakes. *See id.* at 326.

As an initial matter, the court notes that it does not construe a "persistent course of conduct" as the equivalent of "transacting business." D.C. Code § 13-423(a)(4) provides for jurisdiction over a defendant that caused injury in the District of Columbia if that defendant has engaged in three possible types of conduct here: (1) "regularly do[ing] or solicit[ing] business, (2) obtaining "substantial revenue from goods used or consumed, or services rendered" here, or "engag[ing] in any other persistent course of conduct" here. While the first and second activities appear to contemplate matters of a commercial nature, the third — the persistent course of conduct — does not. Accordingly, the court believes that there is no rational basis for lumping in non-commercial factors related to a possible persistent course of conduct with factors relating to "transacting business."[6]

6. As the court wrote in *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264 (D.C. 2001):

> [I]f sufficiently close contacts of *any kind* between the nonresident defendant and the District of

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In this case, the finding of "persistent course of conduct" was based upon matters that were not of a commercial nature, although tangentially related thereto — the continuing medical education activities of the doctors that took place here in the District of Columbia. Many defendants, however, who engage in a consistent course of conduct here are involved with activities that have not the slightest commercial connection. Examples would be baseball tickets, opera tickets, shopping, or school that would bring a defendant into the city a number of times each month. This court cannot imagine cumulating such contacts with factors bearing on "transacting business" to determine whether jurisdiction exists. Having said that, the court will examine the totality of the contacts that the court found to exist under both the "persistent course of conduct" test and the "transacting business" test to determine if there is a sufficient basis for concluding that the defendants were "transacting business" in the District of Columbia.

In considering whether the phone call, the Yellow Pages, the IMF listings and the medical licenses were

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> Columbia were sufficient to allow the Superior Court to exercise personal jurisdiction over [a] defendant under the "transacting business" prong of section 13-423(a)(1) - then the other prong of the long arm statute would be superfluous. *See* D.C. Code § 13-423(a)(2)-(7).

Id. at 270 n.5 (emphasis in original).

sufficient to find that the defendants were "transacting business" in the District of Columbia, the court reviewed the available case law at that time, particularly from the District of Columbia, and briefly reviews below what it concluded with respect to each of those contacts:

Phone Call: With respect to the phone call that Mrs. Bourdin made to the doctors' office in Virginia on the day of the accident, the court found that the case law would not support its inclusion in the mix of contacts supporting "transacting business" because it was Mrs. Bourdin who initiated that contact, not either doctor or any other agent of G&R, Ltd. Amend. Ord. at 56-58.[7] In so finding, the court relied upon *Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 812 (D.C. 1976), where the Court of Appeals wrote: "[A] plaintiff cannot rely on its own activities, rather than those of a defendant, to establish the requisite minimum contacts for personal jurisdiction."[8]

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7. Moreover, the court found insufficient evidence that either Dr. Radice or Dr. Gahres spoke with the receptionist before she gave advice to Mrs. Bourdin.

8. The court noted the longstanding case law in this jurisdiction that any negligence that might have taken place on that phone call occurred in Virginia, where the doctors' office was located, not in the District of Columbia. Amend. Ord. at 38-41 (citing *Margoles v. Johns*, 157 U.S. App. D.C. 209, 214-215, 483 F.2d 1212, 1217-1218 (1973). In *Margolis*, the D.C. Circuit, confronted with a defamation claim arising from a phone call that the out-of-jurisdiction defendant placed to the District of Columbia, found that the alleged defamation could not provide

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This bedrock principle was reiterated more recently in *Shoppers Food Warehouse*, 746 A.2d at 325. There, Judge Reid cited to the Supreme Court's language in *Hanson v. Denckla*, 357 U.S. 235 (1958): "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 253. *See also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).[9]

(Cont'd)
a basis for jurisdiction under Section 13-423(a)(3) of the long-arm statute because the injury resulting from a phone call is deemed to occur where the defendant is located. 483 F.2d at 1217-1219. *Accord, Tavoulareas v. Comnas*, 232 U.S. App. D.C. 17, 18-19, 720 F.2d 192, 193-194 (1983); *Security Bank v. Tauber*, 347 F.Supp. 511, 516-517 (D.D.C. 1972).

9. On the other hand, a defendant who makes a call into the District of Columbia to retain an attorney may find himself subject to suit here when he does not later pay his bill. In *Digital Broad.Corp. v. Rosenman & Colin*, 847 A.2d 384 (D.C. 2004), the Court of Appeals, relying on *Fisher v. Bander*, 519 A.2d 162 (D.C. 1986), held that a defendant who had retained a D.C. law firm by phone is subject to suit here because (1) "*the District of Columbia has a substantial interest in providing a forum to redress wrongs inflicted upon its citizens* by clients who fail to pay for professional services supplied in the District of Columbia by a District of Columbia Law firm;" (2) "the client sought the special benefits of doing business with a Washington, D.C. law firm because of its expertise in regulatory matters;" and (3) "where an out-of-state client employs a District of Columbia attorney to perform services in the District of Columbia, it can hardly be said that litigation of a fee dispute with that same attorney in the same forum poses any undue burden upon the client." *Digital Broad.Corp.*, 847 A.2d at 390-391 (emphasis added).

Thus, the phone call cannot go into the mix of jurisdictional factors for "transacting business" purposes.[10]

Medical Licenses: With respect to Dr. Gahres' and Dr. Radice's District of Columbia medical licenses, the defendants had asserted that such medical licenses were necessary to treat patients who live or work in the District of Columbia, because the doctors would otherwise not be able to have phone conversations with their patients in the District of Columbia. Amend. Ord. at 58. The plaintiffs provided no support for this proposition, however, and the court rejected their argument. *See* Amend. Ord. at 58-59.

In so doing, the court relied upon *Ghanem v. Kay*, 624 F. Supp. 23, 25 (D.D.C. 1984), which adopted the reasoning of *Lebkuecher v. Loquasto*, 389 A.2d 143, 145 (Pa. Super. Ct. 1978), holding that "it is the actual practice of a profession . . . and not the possession of the right to practice that brings a person within the jurisdiction of a . . . court." *Ghanem* concluded:

> [W]here the physician has not aggressively sought patients in the forum and the plaintiff did not consult the defendant as a result of forum activities by the defendant, possession of a license (and a listing in the forum

10. The impact of a phone call on jurisdictional issues is also discussed at length in connection with the issue of whether the District was the situs of injury by the defendants. *See, infra*, at 37-41.

> jurisdiction's phone book) without practicing in the forum is not sufficient to meet the due process requirements that limit jurisdiction under all long-arm statutes.

624 F. Supp. at 25 n.5. This does not appear to be an issue on remand, and the court again concludes that this is not an ingredient to add to the jurisdictional mix.

Yellow Pages and IMF Listings: The above quote from *Ghanem is* equally applicable to the significance of the Yellow Pages and IMF listings. Just as with the medical licenses, there is no indication that the defendants "aggressively sought patients in the forum." *Id.* Their Yellow Pages listing was limited to the names of Dr. Gahres and Dr. Radice, the address and phone number for their Virginia office, and the area of their medical specialty. Dr. Radice's listing at the IMF Health Center was much the same, adding only his year of graduation from medical school, his proficiency in Spanish, his affiliation with Dr. Gahres, his affiliation with the Alexandria Hospital, and that his requirement that payment be made at the time that services are rendered. Such listings are passive, not aggressive, and there is no indication that they were designed to, or particularly likely to, attract District of Columbia residents as patients. Indeed, neither the Yellow Pages listing nor the IMF listing included the fact the doctors were admitted to practice in the District of Columbia. Amend. Ord. at 34.

Moreover, support for the conclusion that the doctors were not attempting to attract District of Columbia patients is provided by the low percentage of their patients who were District of Columbia residents — only 5.5%, or 205 out of 3,742. Indeed, there is evidence that they were actively attempting to discourage District of Columbia patients. The record shows that on a form filled out by Dr. Gahres for Blue Cross/Blue Shield of the National Capitol Area (BCBSNCA) in July 1990, four months before the events at issue here, he crossed off his D.C. Medical License Number and inserted the words "no practice in D.C." A second copy of that form contains the following notation: "No longer practices in D.C.; will send Virginia license only per Dr. Gahres 8/30/90." This is despite the fact that Dr. Gahres had in fact not surrendered his license to practice in D.C. Similarly, in 1992, *both* Dr. Gahres and Dr. Radice listed only their Virginia licenses on the BCBSNCA Participating Provider Agreements, in contrast to the 1985 Agreements, where both doctors listed both licenses. Indeed, when asked by the plaintiffs during discovery whether any of the defendants' D.C. patients were referred by BCBSNCA, Dr. Radice responded that they were not. Amend. Ord. at 23-24.

There is ample authority in the District of Columbia and from other jurisdictions that a simple listing in the Yellow Pages is insufficient for the exercise of jurisdiction under Section 13-423(a)(1). For example, in *Cornwell v. C.I.T. Corp.*, 373 F. Supp. 661, 663 (D.D.C. 1974), the court found that a defendant's listing of an address and telephone number in the District of

Columbia telephone directory, particularly when the listing showed the address to be in Virginia, did not provide the requisite contacts. *See also Blair v. Norwegian Caribbean Lines*, 622 F. Supp. 21, 23-24 (D.D.C. 1985). In *Kennedy v. Ziesmann*, 526 F. Supp. 1328 (E.D. Ky. 1981), a case involving a malpractice suit by a Kentucky resident against an Ohio doctor, the court wrote:

> Nor may the mere carrying of a telephone listing, without additional advertising or other solicitation, amount in and of itself to regular solicitation of business such as to make a physician situated as is the defendant subject to suit under the long-arm statue of a neighboring state where the directory is distributed.

Kennedy, 526 F. Supp. at 1331. Indeed, in *Lebkuecher*, 389 A.2d at 145, the court held that listing oneself in a Pennsylvania classified telephone directory *and* possessing a license to practice medicine in Pennsylvania were insufficient contacts to exercise jurisdiction over an out-of-state doctor who was not aggressively seeking out patients in Pennsylvania. *See also, O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 201 (N.Y. App. Div. 2003)(absent overt solicitation in New York, a listing in a New York telephone book and a New York medical license did not provide a basis for jurisdiction over a New Jersey medical center); *Carte v. Parkoff*, 152 A.D.2d 615, 616-617 (N.Y. App. Div. 1989)(listing by a New Jersey dentist in a New York telephone directory insufficient to show "transacting business").

Moreover, while the trial judge in *Shoppers Food Warehouse, supra*, at 18-20, pointed generally to Shoppers' Yellow Pages advertising, as well as its advertising in *The Washington Post* as contacts that would support a finding that Shoppers was 'transacting business' in the District, *see* 746 A.2d at 324, the *en banc* decision did not. In articulating the holding of the case, Judge Reid wrote:

> Consistent with the trial court's conclusion, we hold that the trial court properly exercised jurisdiction in this matter because appellant, *through its extensive advertising activity in a major District of Columbia newspaper* purposefully and deliberately solicited District residents as customers for its nearby Maryland and Virginia stores and thus transacted business in the District.

746 A.2d at 336 (emphasis added). This court construes the absence of mention of the Yellow Pages in announcing the holding of the *en banc* court in *Shoppers Food Warehouse* as a signal that the question of whether a listing in the Yellow Pages is sufficient to constitute "transacting business" was, at the very least, left to another day.[11]

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11. The court also notes that there is no description of what type of advertising Shoppers might have been doing in the Yellow Pages. Thus, there is no basis for comparison with the facts here.

In any event, the difference between the facts in this case and the facts of *Shoppers Food Warehouse* could not be more stark.[12] The current case involves

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12. Judge Reid set out the facts underlying the *Shoppers Food Warehouse* decision in detail. As explained by Judge Reid, they were as follows:

> Shoppers regularly solicits customers for its Maryland and Virginia stores by placing advertisements in the District of Columbia market through *The Washington Post*, the major newspaper headquartered in Washington, D.C., and other communications media. The record shows extensive Shoppers' weekly advertisements in *The Washington Post* from October 6 through December 1, 1993, including the November 1993 date on which Ms. Moreno slipped and fell in a Shoppers' store. The weekly ads appeared with the bold caption **"SHOPPERS *TOTAL* WAREHOUSE PRICES . . . *EVERYDAY!*** FEATURE PRICES IN EFFECT 7 FULL DAYS!" The body of the ads contained a description of the products for sale in bold letters with the price, and sometimes with a picture of the sale item. At the top of the ad some additional inducement to shop at Shoppers appeared. For example, the October 13 and November 3, 1993 ads for the periods October 13 through 19, and November 3 through 9, 19913, included an opportunity to win tickets to a Washington Redskins football game with an inducement to "see store for details." The ad for November 10 through 16 also offered an opportunity to meet several football players from the Redskins' team on November 23, 1993. In the middle of one of the pages containing

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small listings in the Yellow Pages and at the IMF Health Center. *Shoppers Food Warehouse* involved the flooding of the Washington area with ads in *The Washington Post* and on the broadcast networks, describing and showing pictures of their products, touting their low prices and offering inducements such as Redskins tickets and free turkeys to lure customers to its stores in Maryland and Virginia (Shoppers having no store in the District of Columbia). One advertisement even said: "**No Matter Where You Live . . . It's Worth the Drive!**" 746 A.2d at 330 (emphasis in original).

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> the October 1, 1993 ad, Shoppers stated in bold letters: "**No Matter Where You Live ... It's Worth the Drive!**" The November 17 through November 25, 1993 ad pointed to the possibility that customers "could get a free Thanksgiving turkey or ham" if they collected enough coupons; in addition, the ad offered holiday postage stamps with a savings of ten cents on each book of twenty stamps.
>
> All of Shoppers' advertisement in *The Washington Post*, including those covering the relevant week listed the addresses of its numerous stores located in Maryland and Virginia, including those in Takoma Park, Maryland. The record before us reveals that Shoppers also placed advertisements on television networks in the District, as well as listed one of its stores in the Yellow Pages of the C & P Telephone book in 1993-1994.

746 A.2d at 330 (emphasis in original).

Shoppers was clearly out to "solicit" business from residents of the District of Columbia. For that reason, it is hardly surprising that it was found to be "transacting business" in the District. As Judge Reid wrote in *Shoppers Food Warehouse*, that grocery chain conducted "purposeful, affirmative activity within the District of Columbia by purposefully directing advertisements for its Maryland and Virginia stores at a potential customer base in the District of Columbia." 746 A.2d at 331 (citation omitted). The Court of Appeals found that "[t]hese advertisements are not random, fortuitous, accidental or attenuated, nor are they too trivial to cause a consequence in the District, or too tenuous to satisfy the minimum contacts requirement of the due process clause." *Id.* at 331 (citations omitted).

In the present case, the defendants' passive Yellow Pages and IMF listings bear no similarity to the efforts made by Shoppers to bring District of Columbia residents into their stores. On the contrary, the evidence in the record shows that the doctors were not looking for patients from the District of Columbia, though the doctors would not turn them away if they came. In any event, with a practice and a hospital affiliation located solely in Alexandria, Virginia, the likelihood that District of Columbia residents would seek them out for treatment based on these listings was small. Certainly, the fact that the doctors were licensed in the District of Columbia and visited the District a couple of times monthly for medical education purposes would not increase that likelihood. As Judge Reid explained, under the "minimum contacts" principle, it is necessary to

examine the quality and nature of the nonresident defendant's contacts, as well as whether those contacts are voluntary and deliberate, or only random, fortuitous, tenuous and accidental. *Id.* at 329. Examining the contacts here, the court finds that the quality and nature are not sufficient to meet the applicable test. Rather, the contacts are superficial, trivial and tenuous.[13]

Grand Rounds and the Washington Gynecological Society: Following the direction of the remand opinion, the court now turns to the issue of the significance of

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13. In *Wilson v. Wilson*, 785 A.2d 647 (D.C. 2001), the Court of Appeals wrote: "Even a small amount of in-jurisdiction business activity is generally enough to permit the conclusion that a nonresident defendant has transacted business here." *Id.* at 650 (quoting *Environmental Research Int'l*, 355 A.2d at 811). In *Wilson*, that small amount consisted of the joint ownership and management of an office operating from a townhouse in the District and receiving most of the income, or at least profiting from the business activity conducted there. This "small amount" is considerably greater than exists in the instant case. Moreover, the Court of Appeals in *Environmental Research Int'l*, *supra*, wrote:

> [T]o recognize [the] trend [making even a small amount of in-jurisdiction business activity generally enough to permit the conclusion that a nonresident defendant has transacted business here] is not to suggest that restraints upon jurisdictional authority now are nonexistent, or that the inquiry into the extent of a defendant's contacts with the forum state is an empty process. A meaningful assessment of the defendant's activities is constitutionally mandated.

355 A.2d at 811.

the doctors' attendance at Grand Rounds and meetings of the Gynecological Society, which formed the basis for the court's finding of a "persistent course of conduct," to the separate issue of whether they were "transacting business" in the District of Columbia. In the Amended Order, the court found that attendance at Grand Rounds and at the Society meetings were for the purpose of continuing medical education. Since these were not activities directly related to their practice, nor were they remunerative, the court concluded that they should not be included in the "transacting business" analysis.

In so finding, the court relied upon *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 418 (1984), where the Supreme Court found the fact that the out-of-state defendant sent its employees into the state for training simply was not significant for jurisdictional purposes. There appears to be a scarcity of additional authority addressing the significance of an out-of-state defendant or its agent going into a state for educational/training purposes. The court does note, however, two cases: *Lane v. Boston Scientific Corp.*, 481 S.E.2d 753, 763 (W.Va. 1996), holding that doctors affiliated with the University of Virginia Hospital had not subjected themselves to West Virginia's jurisdiction by entering that State for continuing medical education seminars; and *Advance Petroleum Service, Inc. v. Cucullo*, 614 So. 2d 878, 880 (La. Ct. App. 1993), holding that a Texas lawyer was not subject to jurisdiction in Louisiana by being licensed there, attending continuing legal education courses there, and listing his Louisiana Bar license on his letterhead. Although not articulated

in the Amended Order, in reaching this conclusion, the court also considered the importance of continuing medical education for doctors, and concluded that it would be unwise to discourage the entrance into a jurisdiction for that purpose by the threat that the attendance could be used as a factor to sue the doctor for malpractice in that location for treatment that took place elsewhere.

Guidance from Shoppers Food Warehouse

While the court concludes that none of the factors individually would be sufficient to satisfy the "minimum contacts" requirement of the "transacting business" provision of the District of Columbia long-arm statute, the ultimate question is whether, in their totality, they are sufficient. In making that determination, the court looks to the valuable guidance provided by Judge Reid's comprehensive *en banc* opinion in *Shoppers Food Warehouse*. In that opinion, Judge Reid surveyed decisions of the Supreme Court addressing broad jurisdictional principles, and decisions of our Court of Appeals interpreting the "transacting business" and the "arising from" language of Section 13-423(a)(1) and (b). From those decisions, she distilled a set of seven legal principles that provide an analytical framework for deciding whether the activities of a non-resident defendant meet the "minimum contacts" requirement of the due process clause, and whether the "arising from" requirement of Section 13-423(b) has been met. *See Shoppers Food Warehouse*, 846 A.2d at 329.

The first principle is that the "transacting business" clause is "coextensive in reach with the personal jurisdiction allowed by the due process clause of the United States Constitution." *Id.* Thus, an expansive approach is required in determining whether jurisdiction lies under this provision.

Second, as Judge Reid explained, "there are no 'mechanical tests' or 'talismanic formulas' for the determination of personal jurisdiction under Section 13-423(a)(l) and (b), and the facts of each case must be weighed against notions of fairness, reasonableness and substantial justice." *Id.* Critical to such a weighing is the concept of "fair warning" or "foreseeability of suit" — that is, whether a defendant "should reasonably anticipate being haled into court" in the location at issue. *Id.* at 327-328 (citing *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). If there is forseeability, then a business "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.* at 327 (quoting *World-wide Volkswagen Corp.*, 444 U.S. at 297).

Third, as Judge Reid noted, "under the due process clause, the minimum contacts principle requires examination of the quality and nature of the nonresident defendant's contacts with the District and whether those contacts are voluntary and deliberate or only random, fortuitous, tenuous and accidental." *Id.* at 329. "A plaintiff's unilateral activity in relation to a defendant

cannot alone sustain personal jurisdiction under the 'minimum contacts' theory." *Id.* at 325 (citing *Hanson*, 357 U.S. at 253).

The fourth principle articulated by Judge Reid is that "where a nonresident defendant has purposefully availed itself of the benefits and protections of the District in engaging in a business activity in the forum jurisdiction, it is fair and reasonable to expect it to anticipate being sued in that jurisdiction." *Id.* at 329. Put another way, the issue is "whether the 'quality and nature' of the defendant's activity is such that is it 'reasonable' and 'fair' to require [the defendant] to conduct his defense in that State." *Id.* at 325 (quoting *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978)).

The fifth is that "in examining the nonresident defendant's contacts with the District, the focus is placed on the relationship among the defendant, the forum and the litigation." *Id.* at 329. The closer the relationship between these three, the more likely that jurisdiction will lie.

The sixth is that "it is reasonable and fair for the District to exercise specific jurisdiction where a nonresident defendant has purposefully directed its activities at District residents, and claims against it by a District resident 'arise out of *or* relate to,' *Burger King [Corp v. Rudzewicz]*, 471 U.S [462], at 472 [(1985)] (emphasis added), or have a 'substantial connection'

with, citing *McGee [v. Int'l Life Ins. Co.]*, 355 U.S. [220,] 223 [(1957)], the business transacted in the District . . . ." *Shoppers Food Warehouse*, 746 A.2d at 329.

The seventh also looks to the protection of plaintiff residents and is closely related to the sixth. This principle is that "the District has a manifest interest in providing a convenient forum in which its residents may seek relief for injuries inflicted by the nonresident defendant, especially where litigation within the District would not impose an undue burden on the nonresident defendant." *Id.* at 327-329.

Application of Judge Reid's Seven Principles to the Facts of This Case

With these principles in mind, and understanding that the "transacting business" provision is co-extensive with the due process clause, the court looks first to the seventh principle — the interest of the District of Columbia in providing a convenient forum in which *its residents* may seek relief for injuries inflicted by a nonresident defendant. None of the plaintiffs in this case are residents of the District. They are all residents of Virginia, just as are the defendants. Thus, unlike a case where a State has reached out to provide a convenient forum for its injured resident, the District has no manifest interest in providing a forum for relief here. Indeed, in *Hughes v. A.H. Robins Co., Inc.*, 490 A.2d 1140 (D.C. 1985), the Court of Appeals wrote:

> In this case . . . the District of Columbia has no "interest in adjudicating the dispute." Although the District has a general concern with protecting its residents . . . it has no reason to add to its crowded court dockets a suit by a Virginia plaintiff against a Virginia defendant on a cause of action which arose entirely in Virginia.

Id. at 1146 n.9. This is particularly so since adding such a suit "to its crowded docket" threatens to delay the resolution of suits in which District of Columbia residents have an indisputable interest. *Accord*, *Willis v. Willis*, 211 U.S. App. D.C. 103, 108, 655 F.2d 1333, 1338 (1981) ("The District of Columbia has little interest in providing a forum to a nonresident plaintiff."). *Cf. Digital Broad v. Rosenman & Colin*, 847 A.2d 384, 390 (D.C. 2004) (citing *Fisher v. Bander*, 519 A.2d 162, 163 (D.C. 1986))("[T]his court has a substantial interest in providing a forum to redress wrongs inflicted upon its citizens by clients who fail to pay for professional services supplied in the District of Columbia by District of Columbia law firms.").[14]

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14. In the remand opinion, Judge Ruiz suggests, in the context of Section 13-423(a)(4), that because both Mrs. Bourdin and her husband were employed in the District of Columbia, their "presence" here "was not incidental." *Etchebarne-Bourdin*, 754 A.2d at 328. The court is uncertain what significance it is to draw from that assessment. In its Amended Order, the court cited *Ussery v. Kaiser Found. Health Plan*, 647 A.2d 778, 781 (D.C. 1994), which noted that "[t]he fact that a

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Appendix B

With respect to Judge Reid's sixth principle — that the defendants' activities be directed at District of Columbia residents — as discussed above, the record is clear that the defendants did not purposely direct their activities at District residents. The Yellow Pages, the IMF listings, and the medical licenses were passive. The Grand Rounds, and the attendance at the Washington Gynecological Society were directed at providing the doctors themselves with continuing education, and there is nothing in the record to suggest that they used the continuing legal education to attract D.C. residents as patients. Mrs. Bourdin's phone call to the doctors' office in Maryland surely could not be construed as an effort to attract D.C. residents, since it was initiated by her.

Judge Reid's fifth principle requires an examination of the relationship between the defendant, the forum and the litigation. In this instance, there is virtually no relationship between the defendants, the forum and the litigation. All of the treatment took place in Virginia, including the purportedly negligent advice given on the phone call that Mrs. Bourdin made on the day of the accident from her office at the IMF to the doctors' office

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plaintiff is employed in [D.C.] . . . carries very little weight when [the employment] is not related to the alleged injury." *Id.* at 781. While *Ussery* involved an issue of *forum non conveniens*, the court found its reasoning significant for jurisdictional purposes also. In any event, Judge Reid's seventh principle in *Shoppers Food Warehouse* makes clear that the District's "manifest interest" is in providing a forum for its own residents, not the residents of other states.

in Virginia. The effects of that treatment were suffered most particularly in Virginia. All plaintiffs and all defendants reside in Virginia. The defendants are licensed and actually conduct their business in Virginia. In this instance, the relationship between the forum, the defendants and the litigation is virtually nil, and underscores the fact that the District has little interest in providing a forum for resolution of this dispute.

Judge Reid's fourth principle looks to whether or not the defendants have purposely availed themselves of the benefits and protections of the District by engaging in a business activity here. On the contrary, the opposite is true in this case. As indicated above, the court does not find that the medical education activities of the doctors in the District are "business" activities, though admittedly somewhat related thereto. Indeed, the doctors, at the urging of their insurance company, resolved to close down their District practice rather than "avail" themselves "of the benefits and protections of the District in engaging in a business activity," and hightailed it to Virginia. When there is purposeful availment, "it is fair and reasonable to expect [a nonresident defendant] to anticipate being sued in that jurisdiction." *Shoppers Food Warehouse*, 746 A.2d at 329. Without purposeful availment, however, there is no such expectation and so jurisdiction does not lie.

Judge Reid's third principle requires examination of the quality and nature of the nonresident defendant's contacts with the District and whether those contacts are voluntary and deliberate, or only random, fortuitous,

accidental or attenuated. As Judge Reid wrote in *Shoppers Food Warehouse*, "[t]hese advertisements are not random, fortuitous, accidental or attenuated, nor are they too trivial to cause a consequence in the District, or 'too tenuous to satisfy' the minimum contacts requirement of the due process clause." *Id.* at 331 (citations omitted). Eliminating Mrs. Bourdin's phone call to the doctors on the day of the accident, which was not a voluntary act on the part of the doctors, the court finds that the quality and nature of the other contacts are not sufficient to meet the applicable test. Rather, the contacts are superficial, trivial and tenuous.

Under Judge Reid's second principle, the facts of each case must be weighed against "notions of fairness, reasonableness and substantial justice." *Id.* at 329. Application of the guidelines formulated by Judge Reid show the parties have so little connection with the District of Columbia that exercise of jurisdiction on the theory that the defendants are "transacting business" here would offend "notions of fairness, reasonableness and substantial justice." Most particularly, the court finds it highly unlikely that, given the superficial, trivial and tenuous nature of the "business contacts" with the District of Columbia, the defendants in this case could have foreseen that they would be sued here by Virginia residents for medical treatment rendered entirely in Virginia. *See also, Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 275 (D.C. 2001). Therefore, even though the first principle provides that the "transacting any business" provision reaches the limits of constitutional due process, an application of the second through

seventh principles to the facts of this case shows that a finding of jurisdiction here would reach beyond those constitutional limits.

"Claim for Relief [Must] Aris[e] from Acts Enumerated"

Even, however, if the court were to find sufficient contacts to conclude that the defendants were "transacting business" in the District of Columbia, the court could not find a sufficient nexus for the "arising from" requirement of the Long-Arm Statute. In *Shoppers Food Warehouse*, Judge Reid closely examined the precedent interpreting the "arising from" requirement. In the end, the Court of Appeals concluded that the "arising from" language of Section 13-423(b) should be interpreted "flexibly and synonymously with 'relate to' or having a 'substantial connection with,' in the same way that the Supreme Court's due process analysis has used these terms interchangeably." 746 A.2d at 335. As Judge Reid explained:

> This means that, for the Superior Court to have jurisdiction over Ms. Moreno's claim, the claim had to be related to or substantially connected with Shoppers' advertising activity in the District, *Cohane* [*v. Arpeja-California, Inc.*, 385 A.2d 153, 158 [(D.C. 1978)]; *Berwyn* [*Fuel Inc. v. Hogan*, 399 A.2d 79,] 80 [(D.C. 1979)], that is, as we said in *Trerotola* [*v. Cotter*], 601 A.2d [60,] 64 [(D.C. 1991)], it had to have some 'discernible relationship to Shoppers' advertising activity.'

The Court of Appeals thus concluded:

> Where Shoppers has deliberately and directly solicited District residents to become customers in its Maryland and Virginia stores, there can be no doubt that its advertising relates to or has a discernible relationship to a claim by a District resident who becomes a customer in one of Shoppers' stores and is injured. This is true because it is reasonably foreseeable that, as a result of advertising extensively and over a substantial period of time in the District's major circulation newspaper, Shoppers could be sued in the District on a claim similar to that filed by Ms. Moreno.

Shoppers Food Warehouse, 746 A.2d at 335-336 (citing *Thomason v. Chemical Bank*, 661 A.2d 595, 603 (Conn. 1995)).

Thus, the question here is whether there is a "discernible relationship," defined as "relating to" or having a "substantial connection with" the medical malpractice claim of a Virginia resident against a Virginia doctor for treatment in Virginia that makes it "reasonably forseeable" to the doctor that, as a result of going into the District for continuing medical education, listing his name in the Yellow Pages and the IMF Health Center, being licensed (though not practicing) in the District of Columbia and accepting a phone call from a patient who is Virginia resident, but

called from the District of Columbia, he has subjected himself to suit here on a medical malpractice claim.

In its Amended Order, the court concluded that there was no relationship because it was not the Yellow Pages or IMF listing that caused Mrs. Bourdin to go to the defendants, but rather a referral from her sister-in law. Amend. Order at 60-61. *Shoppers Food Warehouse*, however, made clear that such a direct relationship is not required. Instead, using the language of *Shoppers*, the issue is whether Mrs. Bourdin's claims have a "discernible relationship to" or a "substantial connection with" any of the five contacts considered in connection with the "transacting business" test — that is, the Yellow Pages and IMF listings, the D.C. medical licenses, participation in Grand Rounds, attendance at meetings of the Washington Gynecological Society and the phone call from Mrs. Bourdin.

In answering that question, the distinction between the facts of the instant case and the facts of *Shoppers Food Warehouse* are critical to an analysis of whether there was the necessary "discernable relationship" between the various contacts listed here and the defendants' claims. In *Shoppers*, there was "advertising [that was] extensive[] and over a substantial period of time in the District's major circulation newspaper." 746 A.2d at 336. Here, on the other hand, there were only modest listings in the Yellow Pages and at the IMF Health Center, medical licenses that were not being utilized in the District of Columbia, visits to the District of Columbia a couple of times a month for educational

purposes, and the phone call from Mrs. Bourdin. Most importantly, all of the activity that forms the basis for the malpractice claim occurred in Virginia. Thus, even if the facts of this case were construed as showing that the defendants were "transacting business" in the District of Columbia, no discernible connection between those activities and the injury to the plaintiffs could be said to exist. Indeed, the claims here are simply not connected to any of the defendant's activities in the District.

Moreover, *Berwyn Fuel, Inc. v. Hogan*, 399 A.2d 79 (D.C. 1979), referred to in *Shoppers* as properly applying Section 13-423(b)'s nexus requirement, squarely supports that conclusion. The defendant in *Berwyn Fuel* was a Maryland corporation in the business of delivering fuel. Some of those deliveries were made in the District of Columbia. Thus, Berwyn was admittedly "transacting business" here. The cause of action, however, resulted from an auto accident in Maryland where one of its trucks struck a vehicle driven by the plaintiff, who was a District of Columbia resident. The Court of Appeals held that the plaintiff's "claim for relief from the accident did *not* arise from any of Berwyn's District of Columbia-related acts," that is, deliveries to the District. Rather, the Court of Appeals found the claim for relief arose from activity that occurred completely within Maryland, that is, the accident. The Court of Appeals held that "since the claim must relate to the particular act or transaction forming the basis for personal jurisdiction,

and the claim here did not, the court lacked jurisdiction."[15] *Berwyn Fuel*, 399 A.2d at 80.

Trerotola v. Cotter, 601 A.2d 60 (D.C. 1991), where the "discernible relationship" language appears to have first been used, provides further support for the court's conclusion that the necessary nexus does not exist here. In *Trerotola*, the Court of Appeals overruled the trial court's finding of jurisdiction on the grounds that the plaintiff's claim did not have a "discernible relationship" to the business transacted by the defendants in the District of Columbia. The defendants were the Eastern Conference of Teamsters and its international director, Joseph Trerotola. The plaintiff Cotter was a retired employee of the Conference. The dispute arose over the defendants' refusal to pay the plaintiff a retirement gift that was based on an implied-in-fact contract entered into after the Conference's office moved from the

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15. By analogy to the *Berwyn Fuel* case, putting Dr. Gahres, Dr. Radice and G&R, Ltd. in the shoes of Berwyn Fuel, and the Etchebarne-Bourdins in the shoes of the hypothetical District of Columbia resident, it becomes clear that regardless of the doctors' activities in the District, when all the acts forming the cause of action arose in Virginia, and the plaintiffs are Virginia residents, there is not a sufficient nexus to satisfy the requirement. Since a *resident* of the *District of Columbia* was unable to establish the nexus for jurisdiction here in the District of Columbia based on those facts, it is surely clear that a resident of *Maryland* suing Berwyn Fuel here in the District of Columbia for an accident in Maryland would have had no chance of doing so. If neither a District of Columbia resident, nor a Maryland resident could acquire jurisdiction here, it is clear that *Virginia* residents like the defendants cannot either.

District of Columbia to Bethesda, Maryland. There was no dispute that after that move, the Conference continued to "transact business" in the District of Columbia by representing local unions with approximately 13,000 members. *Id.* at 63. Cotter, who had become an employee of the Conference before its move to Bethesda, himself made frequent trips to the District to transact business for the Conference, assisting local unions in organizing and negotiating labor agreements and in handling labor grievances. *Id.*

In overruling the trial court's finding that the District had jurisdiction over this claim, Judge Ferren, writing for the court, stated that the District's long-arm statute requires a "discernible relationship" between a claim for relief and the "business" transacted in the District. The issue posed, according to Judge Ferren, was "whether Cotter's claim for a retirement gift based on an implied-in-fact contract can be said to have arisen out of the "Conference's activities in representing unions in the District [including the activities of Cotter himself]." *Id.* at 64. The Court of Appeals concluded that the claim had not arisen out of those activities, reasoning that the Conference formed the implied contract with certain retiring employees, including Cotter, in Maryland, based on the fact of retirement alone, and altogether independent of any employee's activities in any particular place, whether in the District of elsewhere." *Id.*

Citing *World-wide Volkswagen Corp.*, 444 U.S. at 297, Judge Ferren explained that "[t]he critical test is

whether the nonresident's 'conduct and connection with the forum state are such that he [or she] should reasonably anticipate being haled into court there.'" *Trerotola*, 601 A.2d at 64. Quoting from *Mouzavires v. Baxter*, 434 A.2d 988, 992 (D.C. 1981), he wrote: "For proper jurisdiction, the Conference's contacts with the District must have been 'of such a quality and nature that they manifested a deliberate and voluntary' anticipation of litigation here over retirement gift (or severance pay) contracts." *Trerotola*, 601 A.2d at 64. Applying that standard, the Court of Appeals concluded that "the Conference cannot reasonably be said to have anticipated being haled into a court in the District of Columbia to litigate a Maryland retirement 'gift' contract as a result of sending Conference representatives to the District to work with unions there." *Id.* Further, Judge Ferren wrote: "[W]e cannot say that the [Conference], by unilaterally choosing to provide certain employees with a supplementary retirement gift — a bonus — based solely on the fact of retirement, not on particular business activities, committed an affirmative act related to its '*contractual* activities' in the District."[16] *Id.* at 65 (emphasis in original). As in *Trerotola*, the plaintiffs' malpractice

16. In so concluding, the Court of Appeals specifically distinguished cases where the plaintiff claims were based on the defendant's acts relating to the nonresident defendant's District business, citing in that regard *Cohane*, 385 A.2d at 159 (claim for sales commissions, some of which were based on District transactions, sufficiently related for jurisdiction), and *Smith v. Jenkins*, 452 A.2d 333, 337 (D.C. 1982)(claim derived from partnership activities in the District).

claims in *Etchebarne-Bourdin* cannot be said to have arisen out of the doctors' contacts in the District — their listings, licenses or continuing medical education activities. Thus, as in *Trerotola*, the defendants "cannot reasonably be said to have anticipated being haled into a court in the District to litigate" a Virginia malpractice claim.

The gravaman of the claim in the case before this court is negligent treatment. With all of that treatment occurring in Virginia, and the plaintiffs and defendants all being Virginia residents, there is simply no reasonable likelihood that the defendants would have anticipated being haled into court here in the District of Columbia on a claim arising from acts occurring solely in Virginia based upon educational visits here, passive listings in the Yellow Pages and at the IMF Heath Center, unused medical licenses, and a phone call placed in the District of Columbia by the plaintiff herself. Accordingly, the court finds that the necessary nexus between the claim asserted and the District of Columbia does not exist.

Having concluded that the defendant's were not "transacting business" in the District of Columbia and that, in any event, the plaintiff's claims for relief do not "arise out of" any business that the defendant's might have been transacting here, the court now turns to the third issue that the remand opinion directed the court to re-examine — "whether the defendants caused 'tortious injury' in the District resulting from "an act or omission outside the District." *Etchebarne-Bourdin*, 754 A.2d at 327.

Appendix B

Section 13-423(a)(4): An Out-of-Forum Tort Causing In-Forum Injury

In the remand decision, the Court of Appeals directed that if the court did not find personal jurisdiction under D.C. Code Section 13-423(a)(1), the "transacting business" provision, which it has not, the court should then "reevaluate whether the defendants caused 'tortious injury in the District' resulting from 'an act or omission outside the District,' D.C. Code § 13-423(a)(4), in the context of the 'nexus' requirement as articulated in *Shoppers Food Warehouse.*" *Id.* Accordingly, the court next proceeds to consider that issue.

D.C. Code § 13-423(a)(4) provides:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —
>
> > (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

D.C. Code § 13-423(a)(4) (2005). Thus, this provision has the same nexus requirement as the "transacting business" provision both in the introductory phrase and in D.C. Code § 13-423(b).

As discussed above, *supra*, at 8, the court found that while the defendants were not "regularly doing or soliciting business," nor "deriv[ing] substantial revenue from goods used or consumed, or services rendered, in the District of Columbia," they were engaging in a "persistent course of conduct" here through their attendance at Grand Rounds and the meetings of the Washington Gynecological Society. In the remand decision, the Court of Appeals concluded that Mrs. Bourdin had suffered "tortious injury in the District of Columbia by an act outside the District of Columbia," in the language of D.C. Code § 13-423(a)(4), "to the extent that her pregnancy began to be imperiled . . . as a result of the unmonitored and untreated physical impact on October 29, 1990 [from the rear end collision]," and, therefore, that Ms. Bourdin's original injury occurred while she was in the District of Columbia." *Etchebarne-Bourdin*, at 327-328. Continuing on, the court wrote:

> Ms. Bourdin could be said to have been injured in the District because the District is where she first had contact with defendants' negligent advice and where she first began to experience the resulting physical reaction; Virginia is the jurisdiction where her injuries continued to cumulate and become more serious, with repeated acts of negligence there.

Id. at 328. Thus, the question is whether there was sufficient nexus between that "imperilment" and the defendants' "persistent course of conduct" in the District of Columbia, that is, their attendance at Grand Rounds and the Washington Gynocological Society meetings, to hale the defendants into court here.

This issue was essentially resolved in the discussion of the "transacting business" basis for jurisdiction discussed above. *See, supra, at* 7-29. Having combined the contacts for "transacting business," that is, the doctors' medical licenses and listings in the Yellow Pages and at the IMF Health Center, with the contacts for a "persistent course of conduct," that is, the Grand Rounds and the meetings at the Washington Gynecological Society, as instructed to do by the remand decision, the court found that "no discernible connection between those activities and the injury to the plaintiffs could be said to exist."

Since the "persistent course of conduct" basis has even fewer contacts supporting it than the "transacting business" basis, it follows that there is an even weaker nexus for jurisdiction under the "persistent course of conduct" provision. Putting this in the terms of *Shoppers Food Warehouse*, there is no "substantial connection" between Grand Rounds or the meetings of the Washington Gynecological Society and the "imperilment" that may have occurred on the phone call.

In addition, although the issue of injury caused by advice or other treatment provided by doctors located

in one jurisdiction to patients located in another jurisdiction appears to be an issue of first impression in the District of Columbia, it has been exhaustively dealt with by other courts across the country that have nearly unanimously rejected the idea that medical care or advice rendered in one jurisdiction that has effects such as "imperilment"[17] or worse in another jurisdiction provides the foreign jurisdiction with a basis for jurisdiction. Because the adoption of a different rule for the District of Columbia would place this jurisdiction entirely out of the mainstream of the law across the United States,[18] the court sets out below in what may appear to be tedious detail the authority to the contrary.

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17. The court notes that "imperilment" suggests that no harm has actually occurred, but simply that the risk of harm has been created. It would therefore appear to be a slim reed upon which to base jurisdiction predicated on the existence of "tortious injury in the District of Columbia." As discussed in the Amended Order, for jurisdiction, the in-forum injury cannot be of any type or amount. Amend. Order at 47-48. Moreover, "[t]he fact that some harm occurs in a jurisdiction is not alone sufficient under [Section 13-423(a)(4)] to find that a defendant 'caused injury' to a plaintiff in that jurisdiction." Amended Order at 47 (citing *American Eutectic Welding Alloys Sales Co. v. Dayton Alloys Corp.*, 439 F.2d 428, 433-434 (2d Cir. 1971)). *See Van Essche v. Leroy*, 692 F. Supp. 320, 325 (S.D.N.Y. 1988); *Granada Television Int'l, Ltd. v. Lorindy Pictures Int'l*, 606 F. Supp. 68, 71 (S.D.N.Y. 1984).

18. *See generally*, Dave R. Bonelli, Annotation, *In Personam Jurisdiction, Under Long-Arm Statute, Over Nonresident Physician, Dentist, or Hospital in Medical Malpractice Action*, 25 A.L.R. 4th 706, §§ 11(A)(3), 11(A)(5)(b) (2005).

Appendix B

The Ninth Circuit's Seminal Case of *Wright v. Yackley*

The seminal decision addressing the issue of malpractice claims that cross jurisdictional boundaries is the Ninth Circuit's opinion of *Wright v. Yackley*, 459 F.2d 287, 288-90 (9th Cir. 1972). In *Wright*, when the relationship between the plaintiff patient and the defendant doctor began, both were South Dakota residents and thus the treatment began in South Dakota. *Id.* at 288. The plaintiff later moved to Idaho, where she filled the prescriptions, which were written by the defendant doctor, who was still located in South Dakota, at an Idaho pharmacy. *Id.* The South Dakota doctor also sent a confirmation to the Idaho druggist that the plaintiff's prescription should be refilled. *Id.* The plaintiff subsequently experienced injury in Idaho that she claimed was due to the doctor's negligence in prescribing the medication. *Id.* She sued her South Dakota doctor in the federal District Court of Idaho, relying on Idaho's long-arm statute and alleging that her doctor committed medical malpractice out-of-state that caused her "tortious injury within [the state of Idaho]." *Id.* That provision of the Idaho long-arm statute had been construed by the Idaho Supreme Court in *Doggett v. Electronics Corp. of Am.*, 454 P.2d 63, 65-66 (Idaho 1969), to permit the Idaho courts to exert jurisdiction over nonresidents whose actions taken outside of Idaho result in injury to persons in Idaho. The provision thus is parallel to the District's long-arm provisions for jurisdiction over out-of-state torts provided in Section 13-423(a)(4).

Appendix B

Although the plaintiff suffered injury in Idaho allegedly due to the doctor's malpractice in South Dakota, the Ninth Circuit held that "the exercise of jurisdiction in these circumstances would be unreasonable and in fact would work contrary to what we deem to be the dominant state interest." *Wright*, 459 F.2d at 289. The court explained that rendering personal services, such as medical care, requires that the jurisdictional analysis consider the tort to be located where the service was rendered, regardless of where the resultant injury occurred. As the Ninth Circuit explained:

> In the case of personal services focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The need is personal and the services rendered are in response to the dimensions of that personal need. They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go.

Id. at 289-90.

Wright went on to articulate three specific reasons why personal medical services require the locus of a medical malpractice tort to be where the services are physically rendered. First, while traditional personal jurisdiction analysis has usually focused on the *location* of activities, doctors do not primarily direct medical

services at *locations*, but rather at *people*, who can unilaterally change the location where treatment might subsequently injure them. As a result, if jurisdiction were based on the location of the patient, mobile patients could subject doctors to suit in jurisdictions where the doctor has made no "systematic or continuing effort . . . to provide service." It would violate due process, *Wright* reasoned, to subject a doctor to suit based solely on where a patient was located when she began to experience injury, unless there was a "systematic or continuing effort on the part of the doctor to provide services which are to be felt in the forum state."[19] *Id.* at 290 (*comparing Int'l Shoe Co.*, 326 U.S. at 320). This reasoning has particular relevance to the instant case, where the doctors were making *no* "systematic or continuing effort" to provide medical service in the District of Columbia and had shut down their practice at the urging of their medical malpractice insurer.

The second reason articulated in *Wright* why personal medical services require the focus of a medical

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19. *See also Cowan v. Krick*, 1994 U.S. Dist. LEXIS 9048, 5-8 (E.D. Pa. 1994):

> Further, the very nature of medical care anticipates that the consequences of treatment adhere to the person treated, regardless of his location. To hold medical providers subject to personal jurisdiction in different, and unforeseen, forum states simply because their patients are mobile vehemently clashes with the notions of fairness underlying the concept of personal jurisdiction.

malpractice tort to be where services are physically rendered is that "the nature of the contacts [in a doctor-patient relationship] is normally grounded outside of any relationship with the [foreign] forum state." *Wright*, 459 F.2d at 290. Moreover, the medical services of local practitioners are not usually directed at any forum other than the one in which their practices are physically located. This is surely true here, where the doctors practice solely in Virginia, the plaintiffs' residence is in Virginia and all treatment was rendered in Virginia.[20] Thus, as in *Wright*, predicating personal jurisdiction on the location of the injured plaintiff would appear to unconstitutionally divert the focus of the jurisdictional analysis away from the purposeful availment of the defendant.

Third, the court concluded in *Wright* "the forum state's natural interest in the protection of its citizens is here countered by an interest in their access to medical services whenever needed." *Id.* at 290-91. The Ninth Circuit, and many of the courts that followed it, expressed concern that doctors' readiness to provide medical services to patients with out-of-state connections would be chilled if the doctors reasonably

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20. By contrast, as pointed out in *Wright*, if a manufacturer regularly ships a faulty product into a forum for sale, personal jurisdiction is proper because the manufacturer purposefully sent the product into the forum in order to benefit from the market there and in order that customers there might benefit from the product's use. 459 F.2d at 290. *See also Atl. Tubing & Rubber Co. v. Int'l Engraving Co.*, 364 F. Supp. 787, 792 (D.R.I. 1973).

feared that they could be sued wherever such patients happened to go. *Wright* noted that a jurisdiction's interest in providing redress for harms inflicted from outside the forum does not exist in a vacuum. It must be balanced against the need of its residents to have access to health care when they are outside their jurisdiction, as well as access to health care not readily available in their own jurisdiction." *Id.* at 291. For these reasons, the Ninth Circuit concluded that "no tort was committed within the State of Idaho which would constitutionally confer jurisdiction." *Id.*

Analysis in Other Federal and State Courts

Numerous other federal courts have adopted the same rule: medical malpractice injuries are located where the service is rendered, regardless of the location of the patient, unless the health care provider has purposefully directed services at the forum where the plaintiff seeks to sue. As the District Court for New Hampshire wrote in *Estate of Mullen by Mullen v. Glick*, No. C-94-377, 1994 U.S. Dist. LEXIS 16020 (D.N.H. 1994):

> Several courts have rejected the view that the "tortious rendition of such medical services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt . . ." *Lemke v. St. Margaret Hospital*, 552 F. Supp. 833, 837-838 (N.D. Ill. 1982) citing to *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972); *Chancellor v. Lawrence*, 501 F. Supp. 997 (N.D. Ill. 1980);

> *Soares v. Roberts*, [417 F. Supp. 304 (D.R.I. 1976)]; *Gelineau v. New York University Hospital*, 375 F. Supp. 661 (D.N.J. 1974); *McAndrew v. Burnett*, 374 F. Supp 460 (M.D. Pa. 1974); *Aylstock v. Mayo Foundation*, 341 F. Supp. 560 (D. Mont. 1972).

Id. at 13-15. *Mullen* itself concluded that there was no personal jurisdiction over a Massachusetts doctor who was alleged to have negligently treated a New Hampshire patient, where the doctor did not purposefully direct services at New Hampshire residents. *Id.* at 15.

A further example, is *Salerno v. Massimino*, No. 80 Civ. 2296, 1980 U.S. Dist. LEXIS 12799 (S.D.N.Y. 1980), where a New York plaintiff sought to sue New Jersey doctors in New York for a negligent prescription written in New Jersey. Under a long-arm statute similar to the District's, the plaintiff sought jurisdiction over the defendants based on her claim that the out-of-state tortious medical malpractice first caused her injury when she took the prescribed medication in New York. *Id.* at 2-3. The court denied the claim, holding that to subject the New Jersey doctors to suit in New York would be fundamentally unfair and would have a chilling effect on the availability of medical services to New York residents. *Id.* at 5.[21]

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21. *See also Gallant v. Trustees of Columbia Univ.*, 111 F. Supp. 2d 638, 643 (E.D. Pa. 2000) ("The weight of authority holds that when treatment is rendered outside the forum state, a nonresident medical provider cannot be subject to specific jurisdiction.").

State courts have also adopted the rule that medical malpractice injuries are held to occur where treatment was provided, unless services were purposefully directed at the forum state. In *Hume v. Durwood Medical Clinic*, 318 S.E.2d 119, 122 (S.C. 1984), for example, the South Carolina Court of Appeals denied personal jurisdiction over North Carolina defendants when a South Carolina resident, whom they treated in North Carolina, subsequently died in South Carolina. Echoing *Wright*, 459 F.2d at 289-290, the court chose to follow the "very substantial line of cases from other jurisdictions that have rejected the view that the tortious rendition of medical services out of the forum state is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt." *Hume*, 318 S.E.2d at 122.

Likewise, in *Estate of Poole v. Grosser*, 731 N.E.2d 226, 229 (Ohio Ct. App. 1999), the Ohio Court of Appeals, as in *Wright*, 459 F.2d at 289-290, declined to find jurisdiction in a case where the medical treatment occurred in Kentucky, but the patient died in Ohio. The court noted: "No Ohio court has adopted this 'portable tort' theory, and several courts from other jurisdictions have explicitly rejected it."[22] *Estate of Poole*, 731 N.E.2d at 229.

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22. *See also Dunn v. Upjohn Co.*, 350 So.2d 127, 129 (Fla. Dist. Ct. App. 1977)(holding that, since the Georgia defendant pharmacist had no other contacts with Florida, Florida had no personal jurisdiction over him for allegedly negligent filling of a prescription for a Florida resident who subsequently returned to Florida and suffered harm there).

Appendix B

Cross-Forum Telephonic Medical Malpractice Claims

Several courts have dealt more specifically with personal jurisdiction in medical malpractice cases alleging cross-forum negligent care over the telephone. They have likewise held that the locus of the alleged malpractice tort is the forum in which the service provider is physically located, not where the allegedly negligent advice is received and acted upon.

For example, in *Bradley v. Mayo Foundation*, Civ. No. 97-204, 1999 U.S. Dist. LEXIS 17505 (E.D. Ky. 1999), the plaintiff, a Kentucky resident, visited the Mayo Clinic in Minnesota for treatment, and then returned to Kentucky. *Id.* at 4-5. He returned to Minnesota, however, for follow-up visits, and had frequent telephone conversations by phone in Kentucky with his doctor in Minnesota. *See id.* at 6-7. In the course of those telephone calls, the doctor gathered updates on the plaintiff's condition, re-evaluated the treatment, and changed the plaintiff's prescriptions. *See id.* The doctor then mailed fresh prescriptions to Kentucky for filling. The doctor, however, had misdiagnosed the problem, and the plaintiff's condition worsened while he was in Kentucky, despite the follow-up care over the telephone. *See id.* at 26.

Based on diversity of citizenship, the plaintiff filed suit in the United States District Court for the Eastern District of Kentucky, claiming that the court had personal jurisdiction over the Minnesota clinic based

on Kentucky's long-arm statute. The applicable Kentucky statute, in pertinent part, was virtually identical to the District of Columbia statute for in-state injury caused by out-of-state acts. *See id.* at 18 (quoting Ky. Rev. Stat. § 454.210(2)(a)(1)-(4)).

With regard to the tortious injury claim, the plaintiffs alleged that "the claim 'arises out of Dr. Hays' activities [and] mismanagement of Mr. Bradley's case over time'. . . ." via telephone calls and letters from Minnesota to Kentucky in which the defendant gave follow-up advice to the plaintiff and made adjustments to his prescriptions. *Id.* at 26. Nevertheless, the court held:

> [The plaintiff] did not receive any medical treatment by the Mayo Clinic or its agents in Kentucky. Follow-up written and telephone contacts with [plaintiff] Mr. Bradley by the defendant or its agents, which are consistent with its diagnosis and treatment during his visits to the Clinic, should not subject the defendant to jurisdiction in the Commonwealth of Kentucky.

Id. at 27.

Moreover, the court noted that "[o]ther courts on similar facts have held that such contacts are not sufficient to allow a state's courts to constitutionally exercise jurisdiction over an out-of-state medical care provider." *Id.* at 27-28. It cited specifically to its own

earlier case of *Kennedy v. Ziesmann*, 526 F. Supp. 1328 (E.D. Ky. 1981), where the court had held that an Ohio based physician's telephone listing in Kentucky and follow-up telephone calls, including a prescription authorized telephonically and filled in Kentucky, were incidental and insufficient for the court to exercise personal jurisdiction over the physician.[23]

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23. *In Kennedy v. Ziesmann*, a pregnant Kentucky resident sued her Cincinnati, Ohio, doctor for allegedly negligent care administered in the doctor's office in Ohio. The patient was a Kentucky resident who was referred by word-of-mouth to the Cincinnati obstetrician whose office was just across the Ohio River from the plaintiff's home. 526 F. Supp. at 1329. The patient claimed jurisdiction in Kentucky because she lived across the Ohio River in Kentucky and suffered injury in Kentucky as a result of negligent obstetric care. "[P]laintiff argued that Dr. Ziesmann in treating a resident of Kentucky 'purposefully' caused 'a consequence' in Kentucky, since he knew plaintiff would return there bearing any ill effects his treatment may have caused her." *Id.* at 1330. In addition, the plaintiff "argue[d] that the listing in directories circulated in Kentucky and the telephone calls Dr. Ziesmann made to Kentucky satisfy the 'purposefully availing' element" of personal jurisdiction analysis. The doctor had no other contacts with Kentucky and did not actively solicit Kentucky residents. The court found no personal jurisdiction, concurring with the *Wright* court that tortious rendition of medical services is not a portable tort "which can be deemed to have been committed wherever the consequences foreseeably were felt . . . ." *Id.* at 1331. Moreover, the court expressed grave concern that a finding of personal jurisdiction in such a case would have a chilling effect on the availability of medical services in Cincinnati, Ohio for Kentucky residents living just across the Ohio River. *See id.* at 1331-32.

In discussing *Kennedy v. Ziesmann*, the court wrote: "If the Kentucky courts were to exercise personal jurisdiction over every doctor of a metropolitan area in another state who permitted his name to be included in telephone directories, or who accepted patients from Kentucky, the result might be that Kentucky residents would be denied sorely needed medical treatment . . . ." *Bradley*, 1999 U.S. Dist. LEXIS at 28 (quoting *Kennedy*, 526 F. Supp. at 1331-1332). It concluded by noting:

> Arguably, in *Kennedy v. Ziesmann* the interest of Kentucky in assuming jurisdiction over the non-resident physician was even greater than the Commonwealth's in this case, since the physician practiced in a neighboring state just a short distance away, and advertised at least minimally by virtue of the Kentucky telephone listing in the forum state.

Bradley, 1999 U.S. Dist. LEXIS 17505 at 28-29. As a result, the *Bradley* court held that "the acts of the defendant *or the consequences caused by the defendant* do not have a substantial enough connection with Kentucky to make the exercise of jurisdiction over the defendant reasonable." *Id.* at 37 (emphasis added).

Likewise, the United States District Court for the Western District of Arkansas in *Sanders v. Buch*, 938 F. Supp. 532 (D.W. Ark. 1996), faced a situation in which a plaintiff alleged harm caused to him in Arkansas by negligent medical advice from his doctor in Texas. While

a resident of Texas, the plaintiff patient had suffered an injury on the job, and had entered into treatment with the defendant doctor. *Id.* at 534. The plaintiff subsequently moved to Arkansas, and transferred his care to an Arkansas clinic. The Texas defendant doctor nevertheless provided necessary follow-up care through two telephone calls with the Arkansas clinic, as well as review of the treatment plan and written reports by mail. The plaintiff's physical condition, however, began to deteriorate in Arkansas, allegedly due to his Texas doctor's faulty advice. *See id.*

The court began its analysis with the Tenth Circuit holding that "in the context of doctor-patient litigation, special rules have evolved to ensure that personal jurisdiction is asserted over a doctor only when [he] has purposefully availed [himself] of the privileges of conducting activities within . . . [the forum] state," *Sanders*, 938 F. Supp. at 536 (quoting *Kennedy v. Freeman*, 919 F.2d 126, 129 (10th Cir. 1990)). The court then also reviewed the Ninth Circuit's ruling in *Wright v. Yackley*, observing that "[i]n reality these special rules or concerns are nothing more than a recognition of the nature of the services being rendered. The focus is on a personal service rendered to the plaintiff rather than on a contractual arrangement or the marketing of a product." *Sanders*, 938 F. Supp. at 537 (citing *McGee v. Riekhof*, 442 F. Supp. 1276 (D. Mont. 1978)).

Applying the rules from the Ninth and Tenth Circuits, the court noted that in Sanders's case "[t]he doctor-patient relationship was established in Texas,

Sanders resided in Texas at the time the relationship was established, all visits and hospitalizations occurred in Texas, the request for home health care originated in Texas, and the prescription for home health care was written in Texas." *Id.* at 538. Further, the court noted that "while the home health care was administered in Arkansas, this [was] true only because [the plaintiff] moved to Arkansas during the relevant period of time" and the plaintiff had "made no showing that Buch," the defendant doctor, "did anything more than confirm his orders regarding the care, respond to inquiries regarding the course of treatment, and receive reports regarding the same from Arkansas." *Id.*

In granting the defendant's motion to dismiss for lack of jurisdiction in Arkansas, the court reasoned:

> *The fact that Buch responded to inquiries . . . [from Arkansas] does not amount to purposeful availment.* Buch was the plaintiff's treating physician. During the course of treatment, Sanders moved to Arkansas but continued to return to Texas for physician visits and periods of hospitalization. Obviously during this time period, Sanders needed and continued to receive medical treatment. *Personal jurisdiction cannot be based on the activities of the plaintiff. Rather, defendant must have purposefully availed himself of the privilege of conducting activities in the state, thereby invoking the benefits and protections of the forum state's laws.*

Id. (emphasis added). Therefore, despite the fact that Arkansas's long-arm statute provided for jurisdiction "to the maximum extent permitted" by the U.S. Constitution, *id.* at 535, the court in *Sanders* declined to extend personal jurisdiction over the defendant doctor where his follow-up phone calls and correspondence allegedly started to cause harm in Arkansas.[24]

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24. In *Brocail v. Anderson*, 132 S.W.3d 552 (Tex. App. 2004) a Texas Court of Appeals relied on *Sanders*, as well as *Wright*, in dismissing a similar cross-forum medical malpractice claim for lack of personal jurisdiction. *Id.* at 559-560. In *Brocail*, the plaintiff patient, a major league baseball player for the Detroit Tigers, sought treatment from a Michigan doctor for injuries he sustained while living and playing in Michigan. The plaintiff subsequently relocated to his former home in Texas to recuperate. Though the plaintiff attended a local clinic in Texas for physical therapy, that therapy was ordered and supervised by the Michigan doctor, in Michigan, via fax machine and alleged telephone conversations. *Id.* at 555-556.

The plaintiff sued his Michigan doctor in Texas, alleging that his condition worsened in Texas after relying on the advice he received in Texas from the doctor in Michigan. The Texas Court of Appeals held that though Texas's long-arm statute provides jurisdiction over anyone who commits a tort in Texas "in whole or in part," 2004 Tex. App. LEXIS 2252 at 557 (citing TEX. CIV. PRAC. & REM. CODE § 17.042):

> [A]ny tort occurred in the exercise of medical judgment in . . . Michigan, not from the communication of that prescription to . . . [the Texas clinic]. . . . Indeed, [where the claim is based on a failure to act], "it is difficult to see how a failure to

(Cont'd)

Appendix B

Kennedy and McGee: Cases Finding Personal Jurisdiction

Two cases where courts found sufficient grounds for personal jurisdiction over doctors who communicated negligent advice across state lines are *Kennedy v. Freeman*, 919 F.2d 126 (10th Cir. 1990) and *McGee v. Riekhof*, 442 F. Supp. 1276 (D. Mont. 1978). In *Kennedy v. Freeman*, a Texas defendant doctor had a mail-order tissue analysis business. He regularly analyzed tissue samples sent to him from Oklahoma doctors. In this case, the doctor of an Oklahoma patient removed a tissue sample from the plaintiff patient in Oklahoma and sent it to the defendant doctor in Texas. The defendant failed to diagnose malignancy in the tissue, and the Oklahoma patient suffered injury as a result. Under these facts, the Tenth Circuit held that personal jurisdiction in Oklahoma over the Texas doctor was proper because the doctor, through his mail order business, had "purposefully direc[ted] his actions there." *Id.* at 129.

In *McGee v. Riekhof*, the plaintiff was a Montana resident who went to a Utah ophthalmologist for retinal surgery. *See id.* at 1277. The plaintiff subsequently

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> act could meet the purposeful availment requirement needed to establish personal jurisdiction."

Id. at 564 (quoting *Anderson v. Bechtle*, 2001 Tex. App. LEXIS 5549 (Tex. App. 2001)).

returned to his home in Utah to recuperate. While recuperating, the plaintiff asked his wife to call the doctor to see when he could go back to work. Over the phone, the Utah doctor advised the plaintiff, through his wife, that he could return to work. On his first day back, he experienced a severe retinal tear. *See id.* The court upheld personal jurisdiction in Montana over the Utah doctor because it considered the doctor's advice to be a new diagnosis, distinguishable from the authorization of the pre-written prescription in *Wright*. *See id.* at 1279.

Both *Kennedy* and *McGee* have been frequently distinguished and widely criticized. Two cases in particular, *Vance v. Molina*, 28 P.3d 570 (Okla. 2001) and *Prince v. Urban*, 57 Ca. Rptr. 2d 181 (Cal. Ct. App. 1996), well illustrate the nature of the criticism. In *Vance*, an Oklahoma patient had been operated upon by a Texas surgeon, and then returned home to Oklahoma to recover. *See* 28 P.3d at 572. There were several telephone calls between the Texas doctor and the patient's family in Oklahoma for the purpose of monitoring her recovery and adjusting her aftercare treatment. Nevertheless, the patient died in Oklahoma due to the allegedly negligent follow-up care of the Texas doctor over the phone. *See id.* The patient's estate relied on *Kennedy v. Freeman* in support of its claim for personal jurisdiction in Oklahoma over the Texas doctor. *Id.* at 574. The Oklahoma Supreme Court observed: "We have found no case that has followed *Kennedy* under circumstances similar to those present here. In fact, every case that we have found that had facts similar to

the facts of this matter has distinguished *Kennedy* . . . ." *Id.* at 573. The court went on further and also rejected the reasoning of *McGee*, stating:

> Although *Kennedy* is clearly distinguishable from the case at bar, we expressly reject the reasoning of a case cited in the *Kennedy* opinion, *McGee v. Riekhof*, . . . which bears more factual similarity to the case at bar than does *Kennedy*. . . . *McGee*, however, has been criticized by other courts that have considered it. See, for example, *Bradley v. Mayo Foundation*, 1999 U.S. Dist. LEXIS 17505, 30, note 11, . . .

Vance, 28 P.3d at 573 n.2.

Prince involved a California patient who, while visiting Illinois, sought treatment from headache specialists who wrote prescriptions that the patient later had filled in California and gave follow-up advice to the patient after she had returned to California. 57 Ca. Rptr. 2d at 182-183. When the patient suffered injury allegedly as a result of the prescribed medication, she sued the Illinois doctors in California under California's long-arm statute for an out-of-state tort that caused in-state injury, relying on *Kennedy* and *McGee*. *Id.* at 183.

The California Court of Appeals distinguished *Kennedy*, noting that the doctor-patient relationship in *Kennedy* was essentially a mail-order one, and rejected *McGee*'s distinction between "follow-up care" and "new-

diagnosis" as unrealistic and unworkable, since both the surgery and the advice were part of one set of services. *Prince*, 57 Ca. Rptr. 2d at 187. The court cited three reasons for its conclusion that jurisdiction did not lie: (1) the unilateral mobility of the patient was a factor beyond the control of the doctor and was essentially unrelated to the doctor's service; (2) the doctor's practice did not specifically direct services at the forum in question — the patient sought the doctor, not vice versa; and (3) since the doctor's contacts with the forum were passive and largely driven by the patient, the state's interest in jurisdiction was overshadowed by its interest in insuring access to health care for out-of-state for its residents. *See id.* The *Prince* court therefore concluded that "an out-of-state physician's follow-up care of a patient by telephone . . . is not a sufficient basis for personal jurisdiction." *Id.* at 188.

Application of the Case Law to the Instant Case

Applying this body of precedent that is based largely on the three principles articulated in *Wright*, the court concludes that there is an insufficient basis for extending personal jurisdiction over the defendants in the present case pursuant to D.C. Code § 13-423(a)(4) providing jurisdiction for an out-of-forum tort causing in-forum injury. The pattern of the facts in this case parallels the cross-forum malpractice cases discussed above. The defendants' practice was localized in Northern Virginia, and in fact the defendants had made a point of *not* directing services at the District by deliberately shutting down their D.C. practice some time before the

events here and ceasing all advertising other than a phone book listing and a listing at the IMF health center. *See, supra,* at 2-4. Mrs. Bourdin received all of her care in the defendants' office in Northern Virginia. *See* Amend. Order at 5.

Moreover, the facts of the plaintiffs' jurisdictional claim are even weaker than the claims denied in the cases discussed above. Unlike the cases of extensive telephonic follow-up care, here there was only one phone call that Mrs. Bourdin made from the District to the defendants' receptionist in Virginia. *See Etchebarne-Bourdin,* 754 A.2d at 324, 328. Moreover, unlike every case discussed above, plaintiff has never been a resident of the District, the forum state. Instead, she has always been a resident of Virginia, together with the defendants. Her only known connection with the District was her employment, a fact, which as discussed above, *see supra,* at 20-21, n.14, places her in no special relationship with the District for jurisdictional purposes. As a result, the reasoning in *Wright* as elaborated by the cases discussed above militates strongly against a finding of personal jurisdiction in the instant case.

Personal jurisdiction cannot be premised on the unilateral actions of the plaintiff.

The *Wright* court rejected jurisdiction over the out-of-forum doctor first because of the due process problem created by tying jurisdiction to the unilateral mobility of plaintiff patients. The court was concerned that it would violate due process to subject the physician

to jurisdiction based solely on the plaintiff-patient relocating to a forum in which "there is no systematic or continuing effort [on the part of the doctor] to provide services . . . ." *Wright*, 459 F.2d at 290.

Here, that due process problem is at its greatest. In this case, the defendants intentionally localized their practice solely in Northern Virginia, and made "no systematic or continuing effort to provide services" in the District. The plaintiff was a Virginia resident who commuted daily to a job in the District. The fact that after the accident she went to her District office rather than her home in Virginia, and thus made the call from the District, was a matter outside the control of the defendants. The plaintiff now seeks jurisdiction over the defendant in the District based on her unilateral actions. As *Wright* explained, to do so would impermissibly shift the focus of personal jurisdiction analysis away from the defendants' actions.

The defendants' contacts with the District demonstrate no purposeful availment of the District's privileges.

With regard to the *Wright* court's second, and related, due process concern, "the nature of the contacts" in this case was "grounded outside of any relationship with the forum state." 459 F.2d at 290. The defendant doctors did not direct their services at Mrs. Bourdin "in order to benefit from effects sought" in the District. *Id.* The provision of services occurred in Virginia and did not depend for its outcome on any

relationship with the District. The chance location of the plaintiff in the District when she made the call "is irrelevant and incidental to the benefits provided by the *defendant[s]* in [their] location" in Virginia. *Id.* (citing *Tilley v. Keller Truck & Implement Corp.*, 438 P.2d 128, 134 (Kan. 1968)) (emphasis added). As a result, the doctors here did not purposefully avail themselves of the privilege of providing medical services within the District when their office responded to the plaintiff's call from D.C. *See id.* (citing *Hanson*, 357 U.S. at 253).

Moreover, the defendants' persistent course of conduct activities — Grand Rounds, Washington Gynecological Society — cannot remedy the lack of purposeful minimum contacts here because they themselves demonstrate the same absence of purposeful availment on the part of the defendants to provide medical services directed specifically at residents of the District. The various claims for personal jurisdiction made in the cases discussed above failed not only because of a low number of contacts with the forum jurisdictions, but more specifically due to an absence of purposeful availment, even when the contacts were more numerous than in the case before us here.

Here, the defendants' persistent course of conduct contacts, i.e., attendance at Grand Rounds and meetings of the Washington Gynecological Society, were passive activities in which they provided no services directed specifically at the District. Therefore, neither providing follow-up care over the phone to their patient nor participating in these activities in the District

constituted "an intent on their part to purposefully avail themselves of the privilege of providing medical services" in the District. *See Hume*, 318 S.E.2d at 123.

"The purposeful availment requirement serves two functions. First, it identifies acts that a defendant would reasonably expect to subject him to jurisdiction in a particular forum. Second, it ensures that only the defendant's acts directed at the forum establish jurisdiction." *Hill v. United States*, 815 F. Supp. 373, 376 (D. Col. 1993) (personal jurisdiction denied in cross-forum telephonic medical malpractice claim). Since the defendants in this case did not direct provision of medical services at the District, personal jurisdiction over them in the District would violate the purposeful availment requirement in exactly the manner warned against in *Wright* by subjecting them to suit in a forum they did not reasonably expect, and for acts they did not direct there.

A finding of personal jurisdiction in the instant case would undermine the District's interest in its residents' access to health care outside the District.

Finally, as *Wright* so well articulated:

> [T]he idea that tortious rendition of [medical services] is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt *is wholly inconsistent with the public interest in having services of this sort generally*

> *available.* Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography.[25]

459 F.2d at 289-290 (emphasis added). Thus, the policy position articulated by the Ninth Circuit and adopted in many other jurisdictions, as shown by the cases discussed herein, is that a forum seeking to protect the access to health care of its citizens must recognize that granting jurisdiction for medical malpractice cases "wherever the consequences foreseeably" occurred will, in the end, limit the medical treatment options for its own residents. *Id.* at 290-91.

This reason resonates particularly here, in a jurisdiction of 68 square miles, where many of its residents already seek medical care in surrounding

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25. With respect to travelers, *Wright* warned: "The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography." 459 F.2d 289-290.

jurisdictions, and with the flight of doctors, may have an increasing need to do so.[26] Since, in addition, District residents travel widely, they may well find themselves in need of care in jurisdictions far more distant than Virginia. Should the District of Columbia adopt a rule that would permit a patient to sue a doctor because the advice by phone from outside the jurisdiction was construed as "imperiling" the patient, doctors (undoubtedly at the urging of their insurance companies), would be inspired to take precautions such as screening patients based on their residency, screening phone calls with respect to their geographic origin or insisting that follow-up treatment happen in the patient's jurisdiction of residence. None of this is likely to promote either access to medical care for D.C. residents, or the public interest.

And the irony would be that if such a rule were instituted as a result of this case, it would have been

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26. *See* Eric Weiss, *D.C. Council Approves Police Raises of 21%*, The Washington Post, June 8, 2005, at B05 ("In other business, Cropp introduced legislation yesterday to reduce the high price of medical malpractice insurance in the District. Doctors complain that insurance costs are causing them to close their practices or leave the city."). *See also*, Lori Montgomery, *Mayor Moves to Curb Medical Malpractice Cost*, The Washington Post, May 5, 2005, at B03 ("As of last year, 62 other doctors had stopped delivering babies in the District [Gynecologist John H. Niles Jr., chairman of the D.C. Medical Society's liability task force] said, citing a Medical Society study . . . Orthopedic surgeon Peter Lavine said he has shifted much of his practice from the District to Virginia. . . .").

not for the benefit of a D.C. resident, but for the benefit of a Virginia resident — one of the locations where the doctors leaving the District of Columbia are relocating. Because of the lack of residency here, the District's interest in providing a forum for this controversy is even less than in the cases discussed above,[27] where, in most instances, the plaintiffs were at least residents of the forum state. Despite that residency, the courts found that the state interest in insuring access for its citizens to out-of-state medical care trumped its interest in protecting their citizens from out-of-state malpractice.[28]

Conclusion

The court therefore concludes, with the additional guidance of *Shoppers Food Warehouse*, that there remains an insufficient basis for personal jurisdiction by this court over the defendants pursuant to either Section 13-423(a)(1) for "transacting any business" in the District or Section 13-423(a)(4) for committing an out-of-forum tort causing injury in the District.[29]

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27. With respect to the significance of Mrs. Bourdin being employed in the District, *see*, *supra*, at 20-21, n.14.

28. In addition, since the defendants simply lack sufficient purposeful minimum contacts with the District to sustain jurisdiction, the fact that the plaintiffs may now be barred from seeking relief in a Virginia court is irrelevant to the jurisdictional analysis. *See Grange Ins. Assoc. v. State*, 110 Wn.2d 752, 757-765 (Wash. 1988).

29. Since "a spouse's loss of consortium claim is dependent on or collateral to the other spouse's negligence claim," (Cont'd)

Appendix B

Accordingly, having addressed the issues raised in the decision of *Etchebarne-Bourdin v. Radice*, 754 A.2d 322 (D.C. 2000) remanding this matter to this court for its re-consideration of its Amended Order of June 6, 1996, granting the motion to dismiss all claims brought by all plaintiffs in this action that were pending against the defendants Luis C. Radice, Edward Gahres, and Gahres & Radice, M.D.'s, Ltd., it is this 29th day of July, 2005, hereby

ORDERED, that the motion of defendants Luis C. Radice, Edward Gahres, and Gahres & Radice, M.D.'s, Ltd., to dismiss for lack of jurisdiction **REMAINS GRANTED** as to all claims brought by all plaintiffs in this action pending against defendants Luis C. Radice, Edward Gahres, and Gahres & Radice, M.D.'s, Ltd.

s/ Noel Anketell Kramer
NOEL ANKETELL KRAMER
JUDGE
SIGNED IN CHAMBERS

(Cont'd)

Massengale v. Pitts, 737 A.2d 1029, 1033 (D.C. 1999), Mr. Bourdin's loss of consortium claim must also fail due to the lack of personal jurisdiction in his wife's underlying tort claim. *See also Beeton v. District of Columbia*, 779 A.2d 918, 925 n.8 (D.C. 2001).

APPENDIX C — OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DECIDED JUNE 1, 2000

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 96-CV-674, No. 96-CV-1277

ALICIA M. ETCHEBARNE-BOURDIN, et al.,

APPELLANTS,

v.

LUIS C. RADICE, M.D., *et al.*,

APPELLEES.

Appeals from the Superior Court of the District of Columbia

(Hon. Noel A. Kramer, Trial Judge)

(Argued January 26, 1998 Decided June 1, 2000)

Before STEADMAN, RUIZ and REID, *Associate Judges.*

Opinion for the court by *Associate Judge* RUIZ.

Concurring opinion by *Associate Judge* STEDMAN.

Appendix C

RUIZ, *Associate Judge*: This appeal raises the issue of the trial court's jurisdiction pursuant to D.C. Code § 13-423(a)(1) (1995 Repl.), which provides personal jurisdiction over a person who "transacts any business in the District of Columbia," and section 13-423(a)(4), which provides personal jurisdiction over a person "causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if [the person] regularly does or solicits business, [or] engages in any other persistent course of conduct . . . in the District of Columbia. To assert personal jurisdiction under these subsections, the claim asserted must "arise from" either the "transaction [of] business" or a "persistent course of conduct" in the District of Columbia. *See* D.C. Code § 13-423(b) ("When jurisdiction over a person is based solely upon [D.C. Code § 13-423(a)], only a claim for relief arising from acts enumerated in this section may be asserted against him.")

In this case against two individual doctors who practice in Virginia and their medical practice firm, a Virginia professional corporation, the trial court concluded that whereas the individual doctors engaged in a "persistent course of conduct" in the District of Columbia, the court lacked personal jurisdiction because they did not "cause[] tortious injury" here as required by section 13-423(a)(4). The trial court also concluded that whereas the individual doctors "transacted business" in the District, the plaintiff's claims did not "arise from" the defendants' business transactions in the District. We remand the case for the trial court's reconsideration of the issues in light of our recent

opinion in *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000).

I.

Plaintiffs-appellants, Alicia Etchebarne-Bourdin and Mauricio Bourdin, Baby Girl Bourdin ("Stephanie Bourdin"), and the Estate of Stephanie Bourdin, filed suit against defendants-appellees, Dr. Luis Radice and Dr. Edward Gahres and Gahres and Radice, M.D.s, Ltd., a Virginia professional corporation ("G & R"). Their complaint alleges two counts. In Count I, the parents, as the appointed legal representatives of the child's estate, bring a survival action under D.C. Code § 12-101 (1995 Repl.), alleging that the negligent acts of defendants caused the death *en ventre sa mere* of Stephanie, who otherwise would have been born a healthy, normal and productive child. Count I claims damages in the amount of $12 million as the present value of the amount that Stephanie would have accumulated if she had lived out her life expectancy of 72 years, and $3500 in medical and funeral expenses charged to the estate.

Count II is an action for medical malpractice in which plaintiffs allege that defendants breached their duty of care by failing to inform Ms. Bourdin, after she notified them that she had been in a car accident, that she should be monitored for signs of fetomaternal injury. The mother claims damages in the amount of $4 million for injuries she sustained as a result of the defendants' negligent acts. The father demands $2 million for what is, in essence, a claim for the loss of his wife's consortium.

Appendix C

In response to the plaintiffs' complaint, defendants filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for forum non conveniens. After extensive pleadings and an oral argument on the motion, the trial court issued a 60-page Summary Judgment Order granting summary judgment to all the defendants solely on the ground of lack of personal jurisdiction.[1] Shortly after the court issued its Summary Judgment Order, defendants' counsel suggested to the trial court that the proper disposition was dismissal, not summary judgment. The trial court agreed, and subsequently issued a 62-page Amended Order, dismissing the complaint for lack of personal jurisdiction. The parties agree that the Amended Order is substantially identical to the prior Summary Judgment Order, with the exception of one additional footnote (note seven) and a revision of its discussion of the plaintiff's burden of proof. Appellants do not challenge the procedural modification of the order and note that, in effect, this court now has before it a single appeal from the trial court's final Amended Order dismissing the complaint for lack of personal jurisdiction over the defendants.

II.

The facts of the underlying case related to the question of personal jurisdiction are, for the most part, undisputed. The parties disagree over the legal consequences of those facts with respect to personal jurisdiction.

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1. The court did not reach the issue of forum non conveniens.

Appendix C

Ms. Bourdin was referred to Dr. Radice by her sister, who previously had been a patient of Dr. Radice when his practice was located in the District of Columbia. At the time of her first appointment with Dr. Radice on May 5, 1990, she was seven-weeks pregnant, with a due date of December 5, 1990.[2] Ms. Bourdin subsequently kept regular pre-natal appointments and her pregnancy continued without complications. At noon on October 29, 1990, Ms. Bourdin was the front-seat passenger in a car that was hit from the rear, as she and Mr. Bourdin exited a parking lot on G Street, N.W., in the District of Columbia. As a result of the impact, she was thrown forward with great force. That same day, Ms. Bourdin complained of severe back and neck pains to her co-workers at the headquarters of the International Monetary Fund ("IMF") in the District of Columbia. One of her co-workers, concerned that the pregnancy might be at risk, advised her to contact the doctor. Ms. Bourdin telephoned Dr. Radice from her office in the District to his office in Virginia that same afternoon. She spoke to the office receptionist and informed her that she had been in a car accident and was in pain: her neck and hip hurt, her back was "kind of numb," and she had a headache. According to Ms. Bourdin, as she talked on the phone, the receptionist relayed her comments to one of the doctors. When asked whether she was having any vaginal discharge or any contractions other than those usually experienced during the last weeks of pregnancy,

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2. Ms. Bourdin had had three previous pregnancies, from which she had two children; one of the pregnancies resulted in a miscarriage.

Ms. Bourdin answered that she was not. The receptionist advised that she should keep her next regular appointment, scheduled for November 2, 1990.[3]

At the November 2 appointment, Dr. Radice examined Ms. Bourdin and noted the October 29 accident and resulting pain. Ms. Bourdin reported her continuing general discomfort to the doctor and expressed concern that the baby was not moving as much as before. Dr. Radice assured her, telling her not to worry about the health of her baby daughter. He did not conduct a sonogram, blood test or other test to monitor the baby's heart or determine whether there might be fetomaternal hemorrhage. The next day, November 3, Ms. Bourdin experienced some additional distress, but thought she might be having premature contractions, as the doctor had suggested.

At her next appointment, on Friday, November 9, 1990, Dr. Gahres examined Ms. Bourdin. She reported to him that the baby's movements had continued to decrease, the baby's heart rate seemed low and that she was having cramps. Dr. Gahres conducted no tests,

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3. The record shows that Dr. Radice was in the office during part of the day on October 29, 1990. Although in his deposition he could not recall having a conversation with the receptionist concerning the mother's car accident, he did not deny that he could have had such a conversation. In the Amended Order, the trial court stated that "it finds no evidence that either Dr. Gahres or Dr. Radice so informed Mrs. Bourdin [through the receptionist], nor that either directed Ms. Staursky to so inform Mrs. Bourdin."

and, ascribing the mother's complaints to the fact that "you women all get crazy during your last weeks of pregnancy," prescribed physical therapy and an anti-acid.

The following Friday morning, November 16, 1990, Ms. Bourdin felt pain and had an unusual vaginal discharge. Believing that her water had broken and that she was going into labor, she contacted the defendants and immediately went to their office. During the examination, Dr. Radice could not detect any fetal movement, so he rushed her to Alexandria Hospital, where she was admitted shortly after noon. Dr. Radice informed her thereafter that the baby was dead. The next day, November 17, 1990, the stillborn baby was delivered, her body decomposed, which, according to the complaint, suggested that she had been dead for a number of days. In the medical records, according to plaintiffs, Dr. Radice notes "No fetal movement x 2 days."[4] An autopsy of the placenta, performed at Alexandria Hospital the same day as the stillbirth, disclosed "massive intervilious hemorrhage" that led to the death of the child in utero.

Also undisputed are the facts surrounding the defendants' medical practice. Drs. Radice and Gahres are physicians specializing in obstetrics and gynecology, whose office is in Virginia. Both doctors reside in Virginia. When the doctors examined Ms. Bourdin, they

4. The trial court stated that it could not decipher the word that plaintiffs contend says "movement."

did so at their office in Virginia. They both are licensed in the District of Columbia as well as in Virginia, and, from 1970 to 1988, had an office in the District. At the urging of their malpractice insurer they closed their District of Columbia office in 1988, gave up their admitting privileges at District hospitals and located their only office in Alexandria, Virginia, where they are actively affiliated with the Alexandria Hospital. Although the doctors are based in Virginia, the trial court found, after an extensive analysis of their contacts with the District of Columbia, that they had engaged in "a persistent course of conduct" in the District, a conclusion that appellees do not challenge on appeal.[5]

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5. The trial court stated:

> The court finds the evidence sufficient to conclude that Dr. Gahres and Dr. Radice, as opposed to G & R, Ltd., have engaged in a persistent course of conduct in D.C. They have been members of the Washington Gynecological Society for many years and have attended meetings six to eight times a year. In addition, in the thirty months for which plaintiffs provided figures, Dr. Gahres attended Grand Rounds fifty-four times and Dr. Radice twenty-two times [in hospitals in the District of Columbia.] Combining their trips into D.C. for Grand Rounds and for meetings of the Washington Gynecological Society, Dr. Gahres would appear to be entering D.C. two to three times a month and Dr. Radice would appear to be entering D.C. between one and two times a month. In *Hughes [v. A.H. Robins Co.*, 490 A.2d 1140 (D.C. 1985)], the Court of Appeals found that the entry into D.C. of A.H. Robins sales representatives

(Cont'd)

The trial court determined, however, that notwithstanding their "persistent course of conduct" in the District, the individual defendants were not subject to personal jurisdiction here because they have not "caus[ed] tortious injury in the District of Columbia by an act or omission outside of the District of Columbia."

The trial court also addressed personal jurisdiction under section 13-423(a)(1), which allows personal

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(Cont'd)

> every two or three weeks constituted "continuous" activity, although not "substantial" enough for the "doing business" test [under D.C. Code § 13-334 (1995 Repl.)]. With that as guidance, the court concludes that Dr. Gahres and Dr. Radice are also engaging in "continuous" D.C. activity of a regular and longstanding nature sufficient to meet the *Parsons* [*v. Mains*, 580 A.2d 1329 (D.C. 1990)] test defining a "persistent course of conduct." Thus, the court concludes that the statutory criteria for a plus factor has been met.

Although it decided that, following the guidance of *Hughes* and *Parsons*, the defendant doctors had engaged in a persistent course of conduct in the District of Columbia, the trial court was troubled about its conclusion, noting that the doctors' visits to the District were no more than those of visiting suburbanites who would not expect to be "haled into court" in the District of Columbia. The trial court was also troubled about the fact that District of Columbia courts had a "negligible interest" in this litigation between a Virginia patient and her Virginia doctors, and that exercising personal jurisdiction in the face of such a slight interest by the forum might implicate due process concerns.

jurisdiction based on a defendant's "transacting any business in District of Columbia," provided that the claim alleged "aris[es] from acts" which constitute the transacting of business in the District. *See* D.C. Code § 13-423(b). The trial court determined that Ms. Bourdin's primary physical injury as a result of the doctors' negligence occurred in Virginia, where most of the allegedly negligent acts took place during the regularly scheduled prenatal appointments. Moreover, the trial court determined, even assuming an injury in the District, the claimed injury did not "arise from" the doctors' contacts with the District. In this regard, the trial court specifically mentioned that the "only conceivably relevant contacts" were 1) Ms. Bourdin's telephone call from the District of Columbia on the day of the accident, October 29, 1990, 2) the doctors' advertising in the Yellow Pages and at the IMF Health Center, and 3) the doctors' medical licenses to practice in District of Columbia. The trial court discounted these contacts and concluded that they were too tenuous to provide a basis for personal jurisdiction under D.C. Code § 13-423(a)(1), particularly as there was no connection between the doctors' advertising in the District and Ms. Bourdin's decision to seek their medical services, because she had been referred by her sister.

III.

Because the trial court found that, on the facts of this case, the individual defendants engaged in a "persistent course of conduct in District of Columbia" sufficient to satisfy that requirement under section 13-

423(a)(4), a finding not challenged on appeal, the defendants also would appear to have been "transacting any business in the District of Columbia" for purposes of section 13-423(a)(1).[6] The question remains, then, whether the plaintiffs' claims "arise from" the business that the doctors transacted in the District. Since the trial court's order in this case, we have had occasion to consider the reach of personal jurisdiction under D.C. Code § 13-423(a)(1) in the context of an injury caused outside the District by a defendant that actively solicited customers in the District. In *Shoppers Food Warehouse*, a District resident sued a food store located in Maryland for injury resulting from the plaintiff's slip and fall while shopping at one of the defendant's Maryland stores. *See* 746 A.2d at 323. We affirmed the trial court's exercise of personal jurisdiction over the defendant because defendant,

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6. We note that D.C. Code § 13-423(a) provides for personal jurisdiction over a person "who acts directly or by an agent." The complaint alleges that "Defendants Radice and Gahres conduct a major part of the business and affairs of their medical practice in obstetrics and gynecology though defendant Gahres and Radice, MD.s, Ltd., a professional corporation in which they are the principal shareholders, officers and employees." The trial court considered, in connection with its analysis under D.C. Code § 13-334 ("doing business"), that Dr. Gahres and Dr. Radice are "agents of G & R Ltd.," but did not consider that agency relationship in its analysis under D.C. Code § 13-423(a), which expressly refers to asserting personal jurisdiction based on the conduct of agents. In this connection, assuming *arguendo* that neither doctor was at the office when Ms. Bourdin called on October 29, 1990, shortly after the car accident, the receptionist also could be an "agent" of G & R Ltd.

> through its extensive advertising activity in a major District of Columbia newspaper [*The Washington Post*] purposefully and deliberately solicited District residents as customers for its nearby Maryland and Virginia stores and thus transacted business in the District; and further, because [plaintiff's] claim was related to or had a discernible relationship to its advertising, [defendant] could have reasonably anticipated being haled into court to defend against a personal injury suit brought by a District resident.

Id. at 336.

Although the facts in the instant appeal are not exactly like those in *Shoppers Food Warehouse*, in that opinion we expressed a standard for the relationship required by section 13-423(b) between the plaintiff's claim and the defendants' conduct that constitutes "transacting any business" or a "persistent course of conduct." Specifically, we rejected the argument—relied upon by the trial court here—that because a plaintiff has not personally acted upon the defendant's advertising, the necessary connection between the claim and the defendant's conduct cannot be made. *Shoppers Food Warehouse*, 746 A.2d at 337. As we stated in *Shoppers Food Warehouse*, a sufficient nexus between the plaintiff's claim and the defendant's forum activities requires only that the claim must be "related to" or "substantial[ly] connect[ed] with" the defendant's

conduct in the forum. *Id.* at 335. Although an important factor in that case was that defendant's sole conduct in the District, the advertising, could be expected to reach many District of Columbia residents who would be persuaded to shop at the suburban stores, in this case the defendants' advertising in the Washington Yellow Pages and at the IMF Health Center would not appear to approximate the "extensive advertising" in which Shoppers Food Warehouse engaged.

On the other hand, the defendants here had significantly greater contacts with the District of Columbia than just advertising, and these professional and commercial contacts, see *supra* note 5, arguably provide the "flexible" nexus contemplated by section 13-423 (b). *See Shoppers Food Warehouse*, 746 A.2d at 335. Even if we were to focus only on the doctors' advertising in the Yellow Pages of the District of Columbia telephone book and at the IMF Health Center, the trial court's analysis discounting the significance of that advertising because Ms. Bourdin did not rely on it to become the defendants' patient is, at least, questionable under *Shoppers Food Warehouse*. Because that opinion was not available to the trial court at the time the trial court made its decision in this case and because the trial court so carefully marshaled the facts of this case in its comprehensive order, we remand the case for its renewed consideration of those facts as a possible basis for personal jurisdiction under section 13-423(a)(1) in light of the guidance provided by *Shoppers Food Warehouse*.

Appendix C

On remand, if the trial court does not find personal jurisdiction under subsection (a)(1), it should reevaluate whether the defendants caused "tortious injury in the District" resulting from "an act or omission outside the District," D.C. Code § 13-423(a)(4), in the context of the "nexus" requirement as articulated in *Shoppers Food Warehouse*, which applies equally to all subsections of section 13-423(a). We agree with the trial court that the relevant inquiry is focused on whether the doctors, by commission or omission, negligently treated Ms. Bourdin by failing to properly diagnose and treat the injury sustained during her pregnancy. In this regard, as the trial court recognized, "the original physical injury" is paramount in determining where the tortious injury has been caused. *See Leaks v. Ex-Lax, Inc.*, 424 F. Supp. 413, 416 (D.D.C. 1976). In this case, most of the occasions for the defendants' negligence, and therefore, tortious injury, occurred during Ms. Bourdin's scheduled visits to the doctors' office in Virginia. There is also support in the record, however, that the triggering event, the automobile collision, occurred in the District of Columbia, and that the first time that the doctors were negligent arguably was when they failed to advise her properly when she called them from the District. To the extent that the pregnancy began to be imperiled at that time as a result of the unmonitored and untreated physical impact on October 29, 1990, Ms. Bourdin's original injury occurred while she was in the District of Columbia.

The place of injury under section 13-423(a)(4) should not be confused, however, with the requirement that the

defendants must have initiated contact in order to meet the requirement for "engag[ing] in persistent conduct." In this case, Ms. Bourdin's telephone call from the District to the doctors' office in Virginia would not, standing alone, establish defendants' "persistent course of conduct."[7] Rather, her telephone call merely provided the instrument through which the doctors communicated their allegedly negligent advice from Virginia ("an act or omission outside the District of Columbia") which may have had the effect of causing physical injury while she was in the District. Although we agree with the trial court's concern that "secondary injury" which follows the plaintiff wherever she travels cannot form the basis for personal jurisdiction over the defendant, we do not consider that the presence of Ms. and Mr. Bourdin, both of whom were employed in the District, was incidental. *Cf. Leaks*, 424 F. Supp. at 415 (holding there to be no personal jurisdiction under section 13-423(a)(4) because the plaintiff was injured in Arizona during a business trip, rather than in the District, when she "took the pills in Arizona, suffered the reaction there, and was treated there," despite continuing to suffer from her injuries after her return to her home in the District of Columbia). Just as in *Leaks*, where Arizona was the site of the plaintiff's "original injury" and the District of Columbia merely the place where the plaintiff continued to suffer residual injury, *see* 424 F. Supp. at 415, so Ms. Bourdin could be said to have been injured in the District because the

7. The trial court found a "persistent course of conduct" to exist for other reasons. See *supra* note 5.

Appendix C

District is where she first had contact with defendants' negligent advice and where she first began to experience the resulting physical reaction; Virginia is the jurisdiction where her injuries continued to cumulate and became more serious, with repeated acts of negligence there.

The case is remanded for the trial court's consideration.

Remanded.

Judge Steadman concurs in the result.

APPENDIX D — AMENDED ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED JUNE 6, 1996

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

C.A. No. 93-12352
Cal. 12

ALICIA M. ETCHEBARNE-BOURDIN and MAURICIO BOURDIN, ADMINISTRATORS OF THE ESTATE OF BABY GIRL ETCHEBARNE-BOURDIN et al.,

Plaintiffs,

v.

LUIS C. RADICE, M.D., et al.,

Defendants.

AMENDED ORDER

This is a case involving a claim which derives from a Virginia resident seeking medical treatment in connection with her pregnancy from Virginia doctors at their offices in Virginia and asserting that their negligent treatment, all of which occurred in Virginia, resulted in her giving birth to a stillborn child in a Virginia hospital and suffering other adverse consequences. The defendants, that is, the doctors and their professional corporation, assert that the District

of Columbia does not have an adequate basis for exercising personal jurisdiction over them. For the reasons set forth herein, the court agrees.

The matter is before the court on defendants' motion to dismiss for lack of personal jurisdiction or, in the alternative, on grounds of *forum non conveniens.*[1] The plaintiffs have filed an opposition thereto (as well as a corrected opposition),[2] the defendants have filed a rebuttal to the opposition (as well as an amendment thereto),[3] and plaintiffs have filed a sur-reply.[4] In addition, after an oral hearing, the court continued this matter to permit plaintiffs to conduct further discovery and to supplement their prior briefs. Thus, this matter is now also before the court on plaintiffs' supplemental opposition (with errata)[5] and defendants' rebuttal thereto.[6] After those papers were filed, a second oral hearing was held.[7] Having considered the papers filed

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1. Cited as Def. Mtn Dismiss.

2. Cited as Pl. Opp.

3. Cited as Def. Rebuttal.

4. Cited as Pl. Sur-reply.

5. Cited as Pl. Supp. Opp.

6. Cited as Def. Second Rebuttal.

7. Thereafter, the court issued an order granting summary judgment to defendants on the ground of lack of personal jurisdiction. Subsequently, defendants submitted a letter to the court raising a procedural issue with respect to whether the (Cont'd)

and the arguments made at the two oral hearings, the court concludes that the motion to dismiss should be granted on the ground of lack of personal jurisdiction.[8]

The plaintiffs bear the burden of establishing that the court has a basis for asserting personal jurisdiction over the defendants. *Parsons v. Mains*, 580 A.2d 1329, 1330 (D.C. 1990); *Gandal v. Telemundo Group, Inc.*, 302 U.S. App. D.C. 359, 364, 997 F.2d 1561, 1566 (1993). Neither party has asked the court to conduct an evidentiary hearing in order to resolve the jurisdictional issue. Rather, they have submitted various affidavits and other exhibits in support of their respective positions on jurisdiction.

The determination of jurisdictional facts is a matter for the court. *See Mathews v. Automated Business Systems & Services, Inc.*, 558 A.2d 1175, 1178-1180 (D.C. 1989). To determine whether jurisdiction exists, the court may conduct an independent review of the

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(Cont'd)

appropriate relief was dismissal, rather than summary judgment. The court treated the letter as a motion for modification of its order and gave the plaintiffs an opportunity to respond if they opposed the procedural modification. Plaintiffs filed no response. Thus, the original order has been amended to grant a dismissal, rather than summary judgment.

8. Because the court concludes that the lack of personal jurisdiction requires dismissal of this action against all three defendants, the court does not reach the issue of whether the court should exercise its discretion to dismiss this case on the ground of *forum non conveniens*.

evidence submitted by the parties, including affidavits. *Aguehounde v. District of Columbia,* 666 A.2d 443, 447 (D.C. 1995); *Mathews,* 558 A.2d at 1178-1180; and *Haase v. Sessions,* 266 U.S. App. D.C. 325, 328-329, 835 F.2d 902, 905-906 (1987). In the context of a jurisdictional determination, affidavits filed by the parties do not convert a motion to dismiss for lack of personal jurisdiction, filed pursuant to Super. Ct. Civ. R. 12 (b) (2), into a motion for summary judgment. *See Mathews,* 558 A.2d at 1178-1180; *Williams v. District of Columbia,* 467 A.2d 140, 141 n.2 (D.C. 1983); *Bernay v. Sales,* 435 A.2d 398, 401 n.3 (D.C. 1981); *Haase,* 266 U.S. App. D.C. at 328-329, 835 F.2d at 905-906; 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure,* § 2713 at 592-593, 608-612 (2d ed. 1983) ("WRIGHT & MILLER").

Nonetheless, there is some authority for the proposition that where there has been no evidentiary hearing, a court must resolve all factual disputes in favor of the party asserting jurisdiction. *See Reuber v. United States,* 242 U.S. App. D.C. 370, 383, 750 F.2d 1039, 1042 (D.C. Cir. 1984); 5A WRIGHT & MILLER § 1351 at 248 n.27. It is not clear that this principal applies in the District of Columbia courts, as opposed to the federal courts. Even if it does, however, the court need not accept at face value the factual assertions made by plaintiffs in their motions papers if those assertions are not supported by the affidavits and other documents submitted. *See Willis v. Semmes, Bowen & Semmes,* 441 F. Supp. 1235, 1239 (E.D. Va. 1977).

Appendix D

In this case, it is unnecessary for the court to reach the issue of whether, in the absence of an evidentiary hearing, all factual disputes on a motion to dismiss must be decided in favor of the party asserting jurisdiction. Rather, the court finds that those material facts asserted by plaintiffs which appear to be in conflict with the defendants' factual assertions are unsupported by the record. Thus, the court finds that there are no genuine material facts at issue. Because the factual findings are critical to the court's ruling on the motion to dismiss, the court begins by setting them out at length.

I. *FINDING OF FACT*

A. *The Events at Issue*

The Complaint in this case, which is unverified, was filed by plaintiffs Alicia Etchebarne-Bourdin, a citizen of Canada, and her husband, Mauricio Bourdin, a citizen of Uruguay. Their domicile at all relevant times has been in Burke, Virginia. Complaint, ¶'s 2, 3. Their place of employment at all relevant times has been in D.C. at the International Monetary Fund (IMF). Complaint, ¶ 4.

Each of the Bourdins is suing in an individual capacity. They are also suing jointly as the Administrators of the Estate of Baby Girl Etchebarne-Bourdin and on behalf of the heirs of Baby Girl Etchebarne-Bourdin. Baby Girl Bourdin, also referred to as Stephanie, was stillborn at Alexandria Hospital in Alexandria, Virginia, on November 17, 1990. Complaint,

¶ 5. The complaint alleges that the baby was a domiciliary and citizen of Virginia, where the Estate was established. Complaint, ¶'s 6, 7.

The defendants are Luis Radice, M.D., Edward Gahres, M.D., and Gahres & Radice, M.D.'s, Ltd. (G & R, Ltd.). Dr. Gahres and Dr. Radice are physicians who specialize in obstetrics and gynecology (OB/GYN). At all relevant times they were residents of Virginia and maintained their only medical office in Alexandria, Virginia. Def. Mtn. Dismiss, Ex. 2. G & R, Ltd., is a corporation formed under the laws of Virginia with its principal place of business in Virginia. *Id.* Mrs. Bourdin became the patient of the defendants on or about May 4, 1990, when she was approximately seven weeks pregnant. Complaint, ¶ 26. It is uncontested that she saw Dr. Gahres and Dr. Radice only in Virginia. Def. Mtn. Dismiss, Ex. 2; Pl. Opp., Ex. 16.

The Complaint has two counts. The first is labeled as a Survival Act Claim brought under D.C. Code § 12-101. The second is labeled as a medical malpractice/negligence claim. The event which ultimately led to this lawsuit occurred on October 29, 1990. On that date, when Mrs. Bourdin was approximately thirty-four weeks pregnant, the Bourdin's were rear-ended by another vehicle as they drove out of the IMF garage. Complaint, ¶'s 28-32.

Mrs. Bourdin returned to her office at the IMF and phoned the defendants' office in Virginia to report the accident. Mrs. Bourdin spoke with Delores Staursky, the

defendants' receptionist, who told her simply to keep her next appointment which was scheduled within four days. Pl. Opp., Ex.'s 2-4. The staff members present in the office on that date were Ms. Staursky; an insurance secretary, Patricia Lambert; and a nurse, Barbara Samuel. Pl. Opp., Ex. 16. Dr. Radice was only present at the office for a portion of the day. *Id.* There is nothing to establish that he was present at the time of the phone call. Dr. Gahres was not present in the office at all on that date. *Id.* Thus, while the Complaint alleges that "Defendants informed Plaintiff that she could 'wait' until her next pre-natal visit, then scheduled for November 2, 1990, to be examined by Defendants Radice and Gahres," Complaint, ¶ 34, the court finds no evidence that either Dr. Gahres or Dr. Radice so informed Mrs. Bourdin, nor that either directed Ms. Staursky to so inform Mrs. Bourdin.

Mrs. Bourdin had office visits with Dr. Gahres on November 2 and with Dr. Radice on November 9 and November 16. Complaint, ¶'s 37, 43, and 47. The Complaint alleges that between the time of the first phone call on October 29 and the office visit on November 16, the defendants breached the standard of care by the advice given to Mrs. Bourdin and by their failure to order certain tests. Complaint, ¶'s 34-49, ¶'s 57-59. When Dr. Radice examined Mrs. Bourdin on November 16, the medical records reflect the following notation: "No Fetal [indecipherable] x 2 days."[9] Pl. Opp., Ex. 6. While

9. The court notes that after the second argument, plaintiffs submitted a document entitled "Plaintiffs' Notice of (Cont'd)

plaintiffs contend that the indecipherable word is "movement," the court is unable to so find from the documents provided.

In any event, there is no question that after the November 16 office visit, Mrs. Bourdin was immediately hospitalized at the Alexandria Hospital and that on November 17 she gave birth to a stillborn baby. Complaint, ¶'s 47-48. Although the unverified Complaint alleges that the baby's body "was decomposed, an indication that the child had been dead for perhaps as many as eight or more days," Complaint, ¶ 48, no affidavit or other document supports the claim that the baby had been dead for so long.[10] Nor is there anything to support the plaintiffs' claim, made in their opposition to the motion to dismiss, that the testimony of Mrs. Bourdin and her medical records establish that the baby had been dead at least two days before the stillbirth and had stopped breathing while [Mrs. Bourdin] was at work on

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(Cont'd)

Filing." Attached to that was what purported to be a "clear copy" of the medical record in Pl. Opp., Ex 6. Counsel represented that the note read "No Fetal Movement x2 days." The court cannot read the word at issue on either copy.

10. Mrs. Bourdin testified at a deposition that at the time of her November 9 office visit she "was worried because the baby's movement had decreased. And I also heard the baby's heart beat was a little too low, and I was feeling cramps." Pl. Opp., Ex 5.

November 15, 1994 at her office in [D.C.]"[11] Pl. Opp. at 5, 22-23. *See also* Pl. Supp. Opp. at 8. Even assuming that the exhibit cited, Pl. Opp., Ex. 6, says, as plaintiffs claim, that there had been no fetal movement for two days, that does not establish either the time or place of death. Nor does either excerpt of Mrs. Bourdin's deposition testimony. *See* Pl. Opp., Ex.'s 4, 5. Nor does the report of Dr. Geoffrey Altshuler, Pl. Supp. Opp., Ex. 7, which did not pinpoint the time of the baby's death, but merely concluded that the disease causing the baby's death occurred after the accident — not before.

The Complaint alleges that as a result of the defendants' negligence, the baby "suffered damage, physical trauma, and considerable ongoing pain and suffering, beginning on October 29, 1990, until she was stillborn on November 17, 1990," such pain and suffering including "loss of nourishment *en ventre sa mere*, leading to slow starvation and otherwise conscious pain and suffering." Complaint, ¶'s 50-51. It also alleges that the defendants' negligence caused the baby's stillborn death. *Id.*, ¶ 52.

With respect to Mrs. Bourdin, the Complaint alleges that the negligence caused her to "suffer[] physical injury to her placenta beginning on October 29, 1990 and continuing through the stillbirth," *Id.*, ¶ 63; caused

11. Indeed, there is also nothing to support plaintiffs' allegation that "[o]n November 16, 1990, while at her office in [D.C.], Mrs. Bourdin felt very ill and noticed an abnormal discharge." Pl. Opp. at 4-5.

her "enormous" physical and emotional pain," *Id.*, ¶ 64; caused her "blood [to become] sensitized, creating a high risk for future pregnancies and requiring medical treatment for her subsequent pregnancy, which was more costly than otherwise would have been required," *Id.*, ¶ 65; and caused her to suffer "in addition to physical injury, emotional distress including denial, depression, anxiety, sleep disturbance, humiliation, embarrassment, and guilt." *Id.* at 66. Mr. Bourdin asserts that the defendants' negligence caused him "loss of affection, solace, comfort, companionship, conjugal life, fellowship, society and all assistance that accompanies the marriage relationship," *Id.* ¶ 70, essentially a loss of consortium claim.

B. *Non-event Related Connections with D.C.*

This summarizes the facts as they relate to the claims of negligence. However, to establish that the defendants have sufficient connection to D.C. so that the Superior Court can exercise jurisdiction over them, plaintiffs have made extensive additional factual allegations. The court's factual findings with respect to these allegations are set forth below.

(1) *Medical Practice.*

Defendants Gahres and Radice, who are each licensed to practice medicine in D.C. as well as in Virginia, had an office in D.C. between 1970 and 1988. Def. Mtn. Dismiss, Ex. 2; Pl. Opp., Ex. 23 (Radice Depo. at 125). In 1988, at the urging of their malpractice insurer, they

closed their D.C. office, stopped seeing patients in D.C., and gave up their admitting privileges at D.C. hospitals. *Id.* and Pl. Opp., Ex. 30.[12] Since then, their sole office has been located in Alexandria, Virginia, where G & R, Ltd. has its principle place of business. Def. Mot. Dismiss, Ex. 2.[13] They are actively affiliated with the Alexandria Hospital. Pl. Opp., Ex.'s 1, 12.

From January 1990 to January 1992, approximately 205 or 5.5% of the defendants' 3,742 patients were D.C. residents. Pl. Supp. Opp., Ex. 6. Of those 205 D.C.

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12. As of 1992, Dr. Gahres and Dr. Radice appear to have had some other form of privileges at D.C. hospitals. On a Provider Credentials Update form for Blue Cross and Blue Shield of the National Capital Area (BCBSNCA) filled out by Dr. Gahres on June 2, 1992, he indicated that he had full privileges at G.W., but "no admitting privileges." Pl. Supp. Opp., Ex. 1 (Subexhibit 4). This is in contrast to the "active" privileges he listed at Alexandria Hospital. *Id.* Accord Pl. Supp. Opp., Ex. 9 (BCBSNCA Participating Questionnaire filled out by Dr. Gahres on July 10, 1990). On a BCBSNCA Provider Credentials Update form filled out by Dr. Radice on June 2, 1992, he indicated that he had "full/unrestricted courtesy" privileges at the Washington Hospital Center. This is in contrast to the "full/unrestricted active" privileges that he listed with Alexandria Hospital. *Id.*

13. Defendants have contended that they do not have medical malpractice insurance coverage for practicing medicine in D.C. Defs. Mtn. Dismiss at 3-4 and Ex. 2. Section IV of their insurance policy, however, states that it applies anywhere in the United States. *See* Pl. Sur-reply, Ex. J. Nonetheless, it is apparent that they believe their insurance company will not permit them to treat patients in D.C. Pl. Opp., Ex. 30.

residents, 113 were at some point during this time period employed in D.C. *Id.* During the same time period, 642 or 14% of the defendants' patients were at some time employed in D.C. *Id.* This group includes the 113 D.C. residents who were employed in D.C.

Plaintiffs assert that Dr. Gahres and Dr. Radice "frequently provide routine, as well as emergency medical consultations to [D.C.] residents by telephoning them in [D.C.]," and that "[m]edical consultations by telephone are also provided to Virginia residents who are employed in [D.C.]." Pl. Opp. at 7. In fact, the evidence is that while in Virginia, Dr. Gahres and Dr. Radice "sometimes" spoke with those patients in D.C. and spoke with them about a variety of subjects including medical advice and refills of prescriptions. Pl. Opp., Ex. 18 (Radice Depo. at 167), Ex. 21 (Radice Depo. at 113, 118, 120), Ex. 22 (Gahres Depo. at 78-79). Thus, despite plaintiffs extensive opportunity to depose Dr. Gahres and Dr. Radice on this subject, there has been no evidence provided that the doctors frequently or regularly provide medical advice by phone to patients in D.C. Nor, as plaintiffs claim, has there been any evidence provided that the doctors maintain their D.C. medical licenses as a necessary predicate to engaging in these phone calls. Pl. Opp. at 11.

Appendix D

(2) *D.C. Hospital Affiliations.*

(a) *Washington Hospital Center.*

Although Dr. Gahres and Dr. Radice gave up their admitting privileges to D.C. hospitals in 1987, specifically the Washington Hospital Center and George Washington University Medical Center (G.W.), Pl. Opp., Ex. 7, they continue to have some relationship with each. With respect to the Washington Hospital Center, each doctor has had the status of Staff Emeritus since relinquishing his admitting privileges. Def. Mtn. Dismiss, Ex. 3. The Washington Hospital Center defines Staff Emeritus as "physicians, dentists and other practitioners who have served the Hospital as members of [the Staff] with credit and honor." *Id.* Incorporated into the definition is the following language: "They shall not have admitting privileges, provide consultations, vote or hold elective office." *Id.* Thus, the Staff Emeritus status is not a clinical association, but a purely honorary one. Pl. Opp., Ex. 33 at 63. It provides them with no privileges. Pl. Opp., Ex. 18 (Gahres Depo. at 61-62). Not only can they not admit patients; they cannot treat patients or participate in committee work or the formulation of policy. *Id.;* Def. Mtn. Dismiss, Ex.'s 2, 3.

Indeed, as Staff Emeritus, Dr. Gahres and Dr. Radice do not so much as have a preferential status in obtaining temporary admitting privileges, even in an emergency. Pl. Opp., Ex.'s 19, 20 and 29; Ex. 33 (White Depo. at 59). Moreover, since 1987, they have had no occasion to attempt to secure such emergency admitting

privileges because none of their patients have had the need for such an admission.[14] For these reasons, the court finds that plaintiffs' claim that defendants "enjoy all the privileges and benefits of a continuing professional and business affiliation with the Washington Hospital Center," Pl. Opp. at 7 is without support in the record.

(b) *G.W. Medical Center.*

(i) *Admitting privileges.*

As with the Washington Hospital Center, Dr. Gahres and Dr. Radice relinquished their admitting privileges at G.W. in 1987. *See* Pl. Opp., Ex 7. Nonetheless, plaintiffs claim that Dr. Gahres and Dr. Radice "may obtain emergency privileges [at G.W.] in accordance with the Hospital By-Laws." Pl. Opp. at 6. Section 5(b) of those bylaws, which are Pl. Opp., Ex. 13, shows that this privilege can be granted to "any qualified person." Thus Dr. Gahres and Dr. Radice stand on the same footing as any other member of the medical community. More importantly, however, as with the Washington Hospital Center, they have never sought to utilize this privilege. Def. Rebuttal, Ex. 1 (Gahres Depo. at 87-89)

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14. Indeed, Dr. Gahres could recall only one instance of a need for emergency admitting privileges. That occurred either before or after 1987 when a patient of Dr. Radice who was a Maryland resident was admitted on an emergency basis to Sibley Hospital. Sibley refused to grant Dr. Radice emergency privileges, and he was able to do no more than pay a social visit on the patient. Def. Rebuttal, Ex. 1 (Gahres Depo. at 87-90).

Appendix D

(ii) *Associate Clinical Professorships and Attendance at Ground Rounds.*

While Dr. Gahres and Dr. Radice are Associate Clinical Professors of Medicine at G.W., "this position authorizes [them] to train and supervise medical students only in Virginia . . ." Def. Mtn. to Dismiss, Ex. 2 (Aff. ¶ 8).[15] The students are taught primarily at their Alexandria office and secondarily at Fairfax hospital. Pl. Opp., Ex. 9 (Gahres Depo. at 42), Ex. 31 (Gahres Depo. at 54). Dr. Gahres and Dr. Radice "do not and are not permitted to train or supervise any medical students in [D.C.]" Def. Mtn. to Dismiss, Ex. 2 (Aff. ¶ 8). "[M]oreover, [they] do not teach medicine in [D.C]." *Id. See also* Pl. Opp., Ex. 8.

The teaching program involves not only students from G.W., but also from the University of Virginia and the Medical College of Virginia. Pl. Opp., Ex. 9 (Gahres Depo. at 45). The program permits students to obtain "real world" experience outside the university setting. Dr. Gahres and Dr. Radice participate in this program as "part of [their] obligation to the medical community . . . [so that they] can contribute something

15. Plaintiffs point out that although neither Dr. Gahres or Dr. Radice any longer has admitting privileges at G.W., they each list their affiliation with the hospital on their Curriculum Vitae. Pl. Opp. at 6. Each doctor's Curriculum Vitae shows this to be the case. *See* Pl. Opp. Ex.'s 1, 12. Both indicate that they are Assistant Clinical Professors at G.W. Dr. Gahres adds the information that he had an active status at G.W. between 1963 and 1987 and now has an inactive status.

back" that they themselves received as medical students. *Id.* It is viewed as an honor, *id.*, and there is no evidence that they are compensated for this service.

Plaintiffs claim that "[a]s Associate Clinical Professors [at G.W., Dr. Gahres and Dr. Radice] participate regularly in teaching and evaluation of medical students enrolled at [G.W.] . . . at weekly 'Ground Rounds' held in [D.C.]." Pl. Opp. at 5.[16] They assert that at Grand Rounds, "faculty members and students review case histories of patients treated at [G.W.] in the District, as well as topics relating to the practice of gynecology and obstetrics." *Id.* Plaintiffs cite to Pl. Opp., Ex. 10, in support of these statements. Neither the exhibit cited by plaintiffs, nor any other materials, however, directly describe what Dr. Gahres and Dr. Radice do at Grand Rounds despite plaintiffs' extensive opportunity to depose each doctor concerning this issue. Nor have they submitted any materials defining Grand Rounds or describing how Grand Rounds are conducted at G.W. In the end, the court finds from close examination of the materials submitted pertaining to this issue that the role of Dr. Gahres and Dr. Radice at Grand Rounds is as students, not as teachers or evaluators.

Pl. Opp., Ex. 10, relied upon by plaintiffs, is no more than a Calendar of Events for G.W.'s OB/GYN

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16. Plaintiffs also claim that Dr. Gahres and Dr. Radice evaluate students at their office in Virginia. That would appear to be correct. *See* Pl. Opp., Ex. 9.

Department during the month of March 1994. While it lists four lectures to be given under the heading of "Grand Rounds," neither Dr. Gahres or Dr. Radice is listed as the professor giving any of those lectures.

Pl. Opp., Ex. 11, consists of lists of sign-in sheets for attendance at Grand Rounds encompassing a period from September 18, 1991, to February 16, 1994. Those pre-typed sign-in sheets list Dr. Gahres and Dr. Radice as two possible attendees out of what the court estimates to be about a hundred.[17] The heading on the sheets themselves is that of G.W.'s Office of Continuing Medical Education. Grand Rounds are referred to as a "Course," and there is a space for continuing medical education credit hours.

G.W.'s guidelines for renewal of clinical professorships, such as held by Dr. Gahres and Dr. Radice, indicate that "[r]egular attendance at continuing medical education programs such as Grand Rounds" is one way of qualifying for renewal. *See* Pl. Opp., Ex. 32. Moreover, the guidelines provide that "[a]ttendance at medical education functions will be monitored by sign-in lists maintained by appropriate administrative staffs," and require attendance at no less than fifty-percent of those sessions. *Id.*

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17. With the exception of a few of the sign-in sheets from 1993, most appear to be missing a second page since the alphabetical listing of the names goes no further than the letter "R" or "K."

Appendix D

There are no figures showing the frequency of attendance of either Dr. Gahres or Dr. Radice in 1990, the year of the events at issue here. The chart summarizing the attendance of Dr. Gahres and Dr. Radice in 1991 through 1994, Pl. Opp., Ex. 11, shows their attendance to have been as follows:

Year	*Gahres Attendance*	*Radice Attendance*
1991 (Sept-Dec)	3	8
1992	23	9
1993	26	13
1994 (Jan-Feb)	2	2

Thus, there is no indication that Dr. Gahres or Dr. Radice teach or evaluate students at Grand Rounds. Rather, it appears clear that they use Grand Rounds as a vehicle for their own continuing medical education. Further, it appears that at least Dr. Gahres, who in 1992 and 1993 may have attended about 50% of the Grand Rounds, may use them as a vehicle to qualify for renewal of his clinical professorship.

(iii) *Recruitment of Medical Students.*

Plaintiffs claim that Dr. Gahres assists in the recruitment of medical students for the clinical program at G.W. Pl. Opp at 5. The excerpt of the deposition of Dr. Gahres, Pl. Opp., Ex. 9, which plaintiffs cite in support of this statement, does not relate to the recruitment of medical students. Nor does any other document

submitted. Thus, the court cannot find that the doctors recruit medical students for G.W.

(iv) *Regular Attendance at Business Meetings.*

Likewise, plaintiffs claim that "defendants regularly attend business meetings of [G.W.'s OB/GYN] Department." Pl. Opp. at 5. In support of this statement, they cite to Pl. Opp., Ex. 10, which, again, is the March 1994 Calendar of Events for the G.W. OB/GYN Department referenced above. One business meeting is listed on this calendar. Apart from the fact that a listing of one business meeting does not establish Dr. Gahres' and Dr. Radice's "regular" attendance, there is no indication that either Dr. Gahres or Dr. Radice attended the one business meeting relied upon. Thus, this exhibit does not support the contention for which it is cited. Nor does any other document submitted.

Plaintiffs further claim that "[p]roposed hospital affiliations with Fairfax Hospital have been discussed at some of these business meetings in [D.C.]." Pl. Opp. at 5-6. In an effort to bolster this claim, plaintiffs go on to represent: "Significantly, defendants were also both affiliated with Fairfax Hospital as staff members there and attended those G.W. departmental meetings at which cooperative arrangements with Fairfax Hospital were discussed." *Id.* at 6. In support of these representations, plaintiffs again rely upon the March Calendar of Events and the sign-in sheets at Grand Rounds. Pl. Opp., Ex.'s 10, 11. Again, however, the claims made by plaintiffs are not supported by the documents on which they rely.

Appendix D

The March Calendar of Events lists "Fairfax Affiliation" as the topic for the March 23, 1994 Grand Rounds. Even if Dr. Gahres or Dr. Radice had attended that session — and there is no indication that they did — plaintiffs have no basis for contending that Grand Rounds are "business meetings." Indeed, as discussed above, they are continuing medical education sessions, not business meetings. On November 20, 1991, G.W.'s Office of Continuing Medical Education held a conference on "Fairfax Affiliation." Pl. Opp., Ex. 11 (sign-in sheet for 11/20/91). The court has been provided with no further information concerning what was discussed. The list of attendees for that date does include both Dr. Gahres and Dr. Radice among the thirty physicians attending. There is no indication, however, that this was a "business meeting." As the sign-in list reflects, Dr. Gahres & Dr. Radice were entitled to one continuing medical education credit for being there.

Thus, in the end there is simply no support for plaintiffs claim that "defendants regularly attend business meetings of the G.W. Hospital." Rather, the absence of support for this claim validates Dr. Radice's deposition testimony that they do not have the right to attend meetings of G.W.'s OB/GYN Department. *See* Def. Rebuttal, Ex. 5 (Radice Depo. at 74).

Finally, plaintiffs represent that "Dr. Radice serves on a committee of Alexandria Hospital which acts as a liaison with the staff of [G.W.] for the purpose of negotiating cooperative business arrangements between the two hospitals;" that "[d]efendants have participated

in ongoing discussions" with the Chairman of G.W.'s OB/GYN Department "concerning [those] cooperative arrangements;" and that " [m]any of these business discussions" have taken place in D.C. "at meetings of the Washington Gynecological Society." Pl. Opp. at 6.

For those representations, plaintiffs cite to Pl. Opp., Ex.'s 14, 15 and 16. An examination of those exhibits reflects that Dr. Radice has not acted as a liaison between Alexandria Hospital and G.W. to "negotiate cooperative business arrangements between the two hospitals." Dr. Gahres testified that Dr. Radice was a member of a committee at Alexandria Hospital with the job of interviewing potential perinatologists[18] from G.W. and other hospitals who might work at Alexandria Hospital. Pl. Opp., Ex. 14. Accepting his testimony as correct, Dr. Radice's membership on such a committee does not amount to "acting as a liaison with the staff of [G.W.]." Dr. Radice himself denied being a part of any committees or meetings at Alexandria Hospital which dealt with perinatology services. Pl. Opp., Ex. 15 (Radice Depo. at 82-83). Instead, he related one casual conversation between himself and the Chairman of G.W.'s OB/GYN Department (Dr. Larson) at a D.C. meeting of a medical society where, out of curiosity, Dr. Radice inquired about the possibility of G.W. providing a specialist in periontology to Alexandria Hospital. *See also* Pl. Opp., Ex. 31. This would not equate to chairman of G.W.'s OB/GYN Department. Thus, plaintiffs' representations

18. A perinatologist is a "superspecialist in obstetrics," according to Dr. Gahres. Pl. Opp., Ex. 31.

concerning Dr. Radice's involvement with promoting business arrangements between Alexandria Hospital and G.W. are based on a completely unjustified exaggeration of the evidence.

(3) *Participation in Washington Gynecological Society.*

Both Dr. Gahres and Dr. Radice have also been members of the Washington Gynecological Society for many years. This group has about six to eight meetings annually, which are usually held at the Shoreham or Watergate Hotels in D.C. Both Dr. Gahres and Dr. Radice try to attend regularly. Like Grand Rounds, the purpose of this group is also for continuing medical education. Its members come from Virginia and Maryland, as well as D.C. Dr. Gahres became president of the society in October or November 1993, and had been the secretary before then. There is no indication of how long he was to hold the office of president. Pl. Opp., Ex. 15 (Radice Depo. at 77-80), Ex. 16 (Interrog. Ans. 10), Ex. 17; Def. Rebuttal, Ex. 5 (Radice Depo. at 75-80).

(4) *Solicitation of Business in D.C..*

(a) *Patient referrals.*

Most of the defendants' patients who are D.C. residents are part of the group that formerly went to their office in D.C. and have no objections to traveling to the defendants' Virginia office. Pl. Opp., Ex. 23 (Radice Depo. at 111). Other D.C. patients have come

to the defendants for treatment as a result of "word of mouth." *Id.* There is no evidence, however, to support plaintiffs' assertion that "[m]any [D.C.] residents are referred to defendants by other patients who used to be treated by defendants at their [D.C.] office." Pl. Opp. at 8. The portion of Dr. Gahres' deposition cited by defendants in support of this representation does not even discuss this point. *See* Pl. Opp., Ex. 22 (Gahres Depo. at 78-79).

Mrs. Bourdin found the defendants as a result of word of mouth. Her sister, a resident of Virginia who had been treated by Dr. Radice both in his Virginia office and his D.C. office, recommended him to Mrs. Bourdin. Pl. Opp., Ex. 24. The Bourdin's decided to use his services in connection with Mrs. Bourdin's pregnancy and prenatal care because G & R, Ltd. participates in and accepts payments made by their health insurer, the Metropolitan Life Insurance Company, under a policy obtained through their IMF employment. Pl. Sur Reply, Ex. I.

Dr. Radice is "one of the specialists in obstetrics and gynecology who request and receive referrals" from the satellite unit of the IMF's Health Service." *Id.* The IMF listing gives his office address in Virginia and indicates that he graduated from medical school in 1957, speaks Spanish, is in a group practice with Dr. Gahres, is affiliated with Alexandria Hospital, and requires payment at the time of the visit. *Id.* The IMF cautions that the listing does not constitute an endorsement. *Id.* There is no claim that Mrs. Bourdin saw this listing

before going to Dr. Radice. Nor is there any information about how many patients have gone to Dr. Radice as a result of this listing.

(b) *Yellow Pages Listing.*

Both Dr. Gahres and Dr. Radice are listed in the Yellow Pages of the D.C. telephone book. Those listings, however, give no more information than their names, area of medical specialty, and their Virginia address and phone number. Pl. Opp., Ex. 16 (Interrog. Ans. 11), Ex.'s 25, 26. As with the listing at the IMF Health Center, plaintiffs have provided the court with no information that any clients have gone to the defendants as a result of this listing.

(c) *HMO's and Insurance Plans in Which Defendants Participated.*

Plaintiffs claim that defendants "aggressively seek [D.C.] patients" and receive numerous referrals from "D.C.-based HMO's which have many members that reside or work in [D.C.]." Pl. Opp. at 12. An examination of the evidence, however, shows that these statements are unsubstantiated. A list of all HMO's and health insurance companies in which G & R, Ltd., participated during 1993 shows that only three out of a total of forty-six were based in D.C. Pl. Opp., Ex. 27.[19] Of the other

19. Plaintiffs represent that "[c]ontracts with these organizations are, upon information and belief, negotiated in [D.C.]." Pl. Opp. at 8. This statement is without any support in the record.

forty-three, eight were based in Virginia, eight were based in Maryland, three were based in Connecticut, three were based in Pennsylvania, three were based in Wisconsin, two were based in New Jersey, two were based in New York, and the remaining were based in fourteen separate states ranging from California to North Carolina. *Id.* The three based in D.C. are listed as the "Cooperative Benefit Adm. Inc.," the "Employees Health Trust — Teamster Local 639," and "Blue Cross/ Blue Shield of the National Capital Area" (BCBSNCA). *Id.* The court has no further information with respect to the first two — including how many, if any, of the defendants' patients are insured through those companies or the residence of such patients.

Plaintiffs have provided the court, however, with additional information concerning BCBSNCA. An affidavit from a BCBSNCA employee indicates that 19.9% of all BCBSNCA subscribers who are not federal employees reside in D.C. *See* Pl. Supp. Opp., Ex. 1. That statistic, standing alone, is meaningless. Plaintiffs have provided the court with no information about how many of those D.C. residents utilize the services of the defendants. Certainly, however, the court has no reason to conclude that a large percentage do so. Indeed, as discussed above, out of defendants' 3,742 patients, only 5.5% are D.C. residents and the court has no basis to determine how many of that 5.5% are insured by BCBSNCA. Thus, there is no reason to conclude that defendants' affiliation with BCBSNCA is in any way designed to attract D.C. residents, let alone to "aggressively solicit" that business, as plaintiff's claim.

Moreover, there is evidence that the defendants have actually sought to discourage the business of D.C. residents insured by BCBSNCA. Defendants did not provide the court with BCBSNCA documents for time periods between 1986 and 1989. However, on a BCBSNCA Participating Questionnaire form filled out by Dr. Gahres in July 1990, four months before the events at issue here, he crossed off his D.C. License Number and inserted the words "no practice in D.C." Pl. Supp. Opp., Ex 9. On a second copy of that form there is the following notation: "no longer practices in D.C.; will send Virginia license only per Dr. Gahres 8/30/90." *Id.* Similarly, in 1992 both Dr. Gahres and Dr. Radice listed their Virginia licenses only on BCBSNCA Participating Provider Agreements, in contrast to the 1985 Agreements, where they listed both their D.C. and their Virginia licenses. *Id.*, Ex. 2. The same is true for a 1992 BCBSNCA Credentials Update filled out by Dr. Radice in 1992, where he listed his Virginia license only. *Id.* Ex. 9. Indeed, when asked whether any of the defendants' D.C. patients were referred by BCBSNCA, Dr. Radice responded that they were not. Pl. Opp., Ex. 23 (Radice Depo. at 111).

In an effort to enhance the significance of a D.C.-based tie between G & R, Ltd.'s, financial connection with BCBSNA, plaintiffs list the total revenues received by G & R, Ltd., from BCBSNCA between 1991 and 1994. Those were $118,436.62 in 1991; $108,655.33 in 1992; $86,404.94 in 1993; and $43,190.31 in the first half of 1994. Pl. Supp. Opp., Ex.'s 1, 4. Although plaintiffs, relying on these figures, claim that "substantial

revenue" has been "derived by defendants . . . by providing medical services to [D.C.] residents through BCBSNCA," *Id.* at 3, there is no evidence that this income derived from the treatment of patients who were D.C. residents. Indeed, since only 5.5% of the defendants' 3,742 patients are D.C. residents, and since it is unlikely that most are insured by BCBSNCA, it is highly probable that the yearly revenues from BCBSNCA derived from the treatment of D.C. residents are no more than one or two thousand dollars. Moreover, there is certainly no evidence that any of that revenue resulted from services provided in D.C.

Plaintiffs claim that the defendants "derive substantial revenue by their participation in the District-based insurance program of the World Bank." Pl. Supp. Opp. at 3 n.l. Since the exhibit which plaintiffs rely on in support of this statement, the declaration of Mr. Bourdin (Pl. Sur-Reply, Ex. I), refers only to the IMF, not the World Bank, the court construes this claim as applying to the IMF. Either way, the claim is without support. There is no evidence how many of the defendants' patients are employed at the IMF or are insured through an IMF-related insurance plan. Rather, the declaration of Mr. Bourdin (Pl. Sur-reply, Ex. H), relied upon by plaintiffs to support this claim, simply states that the "IMF provides to its employees, as a benefit, health insurance managed by Metropolitan Life Insurance Company" and, as previously discussed, describes Dr. Radice's listing at the IMF's satellite unit. Neither it nor any other document reveals whether the Metropolitan Life Insurance health program is the only

option for IMF employees, nor how many IMF employees are patients of Dr. Gahres and Dr. Radice, nor how many of those employees are D.C. residents. Thus, as with BCBSNCA, the court has no basis for determining the revenues derived from IMF employees.[20]

(5) *Dr. Gahres' Role as a Consultant for BCBSNCA.*

Finally, Dr. Gahres has served as a professional adviser to BCBSNCA at least since 1987. Pl. Supp. Opp., Ex. 2. In that role he will, if called upon by BCBSNCA, review, advise on health policy, and consult on legal proceedings. *Id.* The records show that for those services, G & R, Ltd., received $740.00 in 1989, $1,260.00 in 1990, $1,550.00 in 1991, and $2,265.00 in 1992, $645.00

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20. Plaintiffs also ask the court to assume that BCBSNCA is a D.C. corporation. Plaintiffs state, "Dr. Gahres reviews claims and provides professional advice directly to BCBSNCA, *a D.C. Corporation*" (Emphasis Supplied). Pl. Supp. Opp. at 2. The court can find no evidence of this, nor is the matter addressed in the affidavit of Earle B. Doweary, a legal assistant at BCBSNCA. Pl. Supp. Opp., Ex. 1. Indeed, Dr. Gahres' and Dr. Radice's 1985 Participating Provider Agreements are with "Group Hospitalization and Medical Services, Inc. [GHMSI] trading as Blue Cross and Blue Shield of the National Capital Area." Pl. Supp. Opp., Ex. 2. Their 1992 agreements refer to BCBSNCA as a "Division" of GHMSI. Thus, BCBSNCA does not appear to be a legal entity. Plaintiffs have provided no information about GHMSI. While documents provided show that GHMSI has an office at 550 12th Street, S.W., in D.C., that fact alone neither establishes that D.C. is its principal place of business, nor its place of incorporation.

in 1993, and $345.00 in the first half of 1994. Pl. Supp. Opp., Ex.'s 1, 2.[21] BCBSNCA provided Dr. Gahres with insurance coverage for this activity. Pl. Supp. Opp., Ex. 3. There is no evidence that Dr. Gahres solicited this business, that he has performed any of the consultations in D.C., or that any of the consultations related to patients who reside in D.C. or to treatment rendered in D.C.

II. *CONCLUSIONS OF LAW*

In cases such as this, involving non-resident defendants, "[a] court may properly assert personal jurisdiction . . . [1] where a statute authorizes service of process and [2] where such service is consistent with due process." *Trerotola v. Cotter*, 601 A.2d 60, 63 (D.C. 1991). *See also International Union of Electrical Workers v. Taylor*, 669 A.2d 699 (D.C. 1995). The critical issue in determining whether the exercise of *in personam* jurisdiction comports with due process is whether "the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 490, 501 (1980), quoted in *Hughs v. A.H. Robins Co.*, 490 A.2d 1140, 1144 (D.C. 1985). The forum's "interest in adjudicating the dispute"

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21. The documents indicate that Dr. Gahres was paid $80.00 an hour from 1987 to 1991 and $90.00 an hour thereafter, except for consultation on legal proceedings, for which he was paid $120.00 an hour. Pl. Supp. Opp., Ex.'s 1, 3.

may affect this analysis. *See World-Wide Volkswagen Corp., supra,* 444 U.S. at 292, 100 S. Ct. at 564; 62 L. Ed. at 498; *McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957); *Hughs, supra,* 490 A.2d at 1146 n.9.

In evaluating whether there is a basis for D.C. to exercise personal jurisdiction over the defendants in this case, [e]ach defendant's contacts with the forum's State must be assessed individually." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 781 n.13, 104 S. Ct. 1473, 1482 n.13, 79 L. Ed. 2d 790, 799 n.13 (1984), quoted in *Crane v. Carr,* 259 U.S. App. D.C. 229, 232, 814 F.2d 758, 761 (1987). Having examined each defendant's contacts with D.C., the court concludes that the facts provide no statutory basis for exercising jurisdiction over Dr. Gahres, Dr. Radice or G & R, Ltd.

A. *D.C. Code § 13-334 (Doing Business)*

As their statutory bases for asserting personal jurisdiction over the defendants, plaintiffs rely on both the "doing business" provision found in D.C. Code § 13-334 (1995 Repl.)[22] and on subsections (a)(1), (a)(3), and

22. Although plaintiffs argue in their motions papers that § 13-334 provides a basis for exercising jurisdiction over the defendants, they did not cite to that provision in the Complaint itself. Were the court to find that plaintiffs had met their burden of establishing that defendants are "doing business" in D.C., however, the court, pursuant to Super. Ct. Civ. R. 15(a), would grant plaintiffs leave to amend the Complaint.

(a)(4) of the D.C. Long Arm Statute, D.C. Code § 13-423 (1995 Repl.).[23] Unlike the Long Arm Statute, which permits the exercise of jurisdiction only as to claims arising out of a defendant's contact with D.C., § 334 "confers jurisdiction over [a] de ndant for all purposes." *Ross v. Product Dev. Corp.*, 736 F. Supp. 285, 290 (D.D.C. 1989), quoted in *Everett, supra*, 628 A.2d at 108. By its plain language, however, § 334 applies only to. corporate defendants. Thus, plaintiffs cannot use § 334 to obtain jurisdiction over either Dr. Gahres or Dr. Radice individually,[24] but only over G & R, Ltd.

While there is no bright line test to determine what constitutes "doing business," it has been defined as "any continuing corporate presence in the forum state directed at advancing the corporation's objectives." *See AMAF Int'l Corp., supra*, 428 A.2d at 851, quoted in *Everett, supra*, 628 A.2d at 108; *Price v. Griffin*, 359 A.2d 582, 586 (D.C. 1976). Similarly, "doing business" has been defined as "continuous, systematic activity."

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23. The "doing business" statute preceded D.C.'s Long Arm Statute and "continues to exist as a basis for personal jurisdiction alongside the more comprehensive long arm provisions . . . in the D.C. Code." *Everett v. Nissan Motor Corp.*, 628 A.2d 106, 108 (D.C. 1993), quoting *AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849, 851 n.2 (D.C. 1981).

24. Nonetheless, the court has also examined the D.C. contacts of the individual doctors, since in some instances they may have been acting as agents of G & R, Ltd. The plaintiffs never address the issue of the degree to which Dr. Gahres and Dr. Radice were acting in their individual capacity, as opposed to acting as agents of the corporate entity.

Goldberg v. Southern Builders, Inc., 87 U.S. App. D.C. 191, 193, 184 F.2d 345, 347 (1950). " [M]erely casual or occasional acts, not constituting a regular or continuous course of business, are not sufficient . . ." *Frene v. Louisville Cement Co.*, 77 U.S. App. D.C. 129, 134, 134 F.2d 511, 516 (1943). "[I]t is the cumulative significance of all the activities conducted in [the] jurisdiction rather than the isolated effect of any single activity that is determinative on the question of doing business . . ." *Goldberg, supra*, 87 U.S. App. D.C. 191, 184 F.2d 345.

A review of the case law in this jurisdiction provides a framework for determining whether the connections of G & R, Ltd., are sufficient to show that the corporate entity is "doing business" here. In *AMAF Int'l Corp., supra*, 428 A.2d 849, for example, a corporation was found to be "doing business" in D.C. when it was licensed to do business here, had maintained a registered agent here and conceded that it did business here by selling its products to local supermarkets. In *Price, supra*, 359 A.2d 582, a corporation was found to be "doing business" in D.C. when it had a business office here staffed by the managing director of the corporation, had sold stock here, and had conducted negotiations here. In *Ross, supra*, 736 F. Supp. 285, a corporation was found to be "doing business" in D.C. when it was licensed to do business here for the purpose of distributing telephone books, had a registered agent here and actually distributed phone books here on a regular and ongoing basis twenty-one out of fifty-two weeks each year. In *Ramamurti v. Rolls-Royce, Ltd.*, 454 F. Supp. 407 (D.D.C. 1978), *aff'd* 198 U.S. App. D.C. 92, 612 F.2d 587

{1980), a corporation was found to be "doing business" in D.C. where it had an office here which permanently employed four engineers and two clerical assistants to respond to inquiries and provide ongoing support services connected with their sales.[25]

The "doing business" case with facts most closely analogous to the present one is *Hughes, supra,* 490 A.2d 1140. There, the plaintiff, a Virginia resident employed in D.C., brought suit against A.H. Robins, Inc., a Virginia corporation with its principal place of business in Richmond. In her suit, the plaintiff alleged that she had suffered personal injury as a result of her use of one of A.H. Robins' products, which had been provided to her by her doctor at his office in Virginia.

A.H. Robins was not licensed to do business in D.C. and it did not maintain a registered agent here. It had no sales office and made no direct sales here. Rather, it sold its products only to wholesalers outside D.C.

Over a period of ten years, however, A.H. Robins had sent representatives into D.C. once every two or three weeks to promote its products by visiting doctors, answering their questions, and supplying them with samples and scientific studies. In addition, A.H. Robins advertised its products sporadically on D.C. television

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25. Although plaintiffs cite *Chrysler Corp. v. General Motor Corp.*, 589 F. Supp. 1182 (D.D.C. 1984) in support of their claim that G & R, Ltd., is "doing business" in D.C. pursuant to § 334, Chrysler addressed not whether the defendants were "doing business," but whether they were "transacting business" under § 423(a) (1) of the Long Arm Statute.

stations and in periodicals and newspapers that were published and circulated here. It also mailed promotional literature from time to time into D.C. for potential purchasers of its products. Further, A.H. Robins derived revenues from the sale of its products in D.C. In one year, for example, $3,236,800, or 0.7 percent of its total worldwide sales, was derived from sales of its products in D.C.[26]

Reviewing the general types of corporate business contacts with a forum which have been looked to as a basis for asserting *in personam* jurisdiction, *Hughs* listed (1) solicitation of sales by corporate agents in the forum, (2) advertising in the forum, and (3) the derivation of significant revenue from the forum. *Hughs*, held, however, that where, as in both *Hughs* and the instant case,[27] the cause of action was not related in any way to

26. A.H. Robins also maintained an office in D.C. for the purpose of monitoring congressional legislation affecting the pharmaceutical industry. Activities conducted here solely for the purpose of gathering information from the federal government, however, are not contacts which count toward establishing jurisdiction. *Hughs, supra*, 490 A.2d at 1145 n.4.

27. The precedent relating to when a cause of action is related to a defendant's in-forum activities is more fully developed in connection with the case law addressing jurisdiction under § 423(a)(1) than it is under § 334. Thus, the court has analyzed whether the plaintiffs' instant cause of action is in any way related to the defendants' in-forum activities in that context. The court's conclusion in the context of § 423(a)(1) — that none of the defendants' connections with D.C. are any more than remotely connected with plaintiffs' cause of action — is equally applicable in the context of § 334. *See infra* at 52-59.

the in-forum activities carried on by a defendant, the defendant's activities must be not only continuous, but also substantial. *Supra*, 490 A.2d at 1146. *See also, Ramamurti, supra*, 454 F. Supp. at 413. Indeed, due process requires "a particularly searching scrutiny of alleged jurisdictional contacts" under those circumstances. *Bayles v. K-Mart Corp.*, 636 F. Supp. 852, 855 (D.D.C. 1986), quoted in *Ross, supra*, 736 F. Supp. at 291.[28]

In *Hughs*, the Court of Appeals ruled that the visits of A.H. Robins' representatives every two or three weeks constituted "continuous" but not "substantial" activities. With respect to advertising, it declared that "[a]s a contact, advertising is significant only when it is pervasive or when the cause of action arises in the forum," and concluded that the D.C. advertising of A.H. Robins was neither. Finally, it ruled that the more than three million dollars in annual revenues derived from sales in D.C., standing alone, were not substantial enough to support jurisdiction when the cause of action is unrelated to the in forum activity.

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28. "[E]ven one contact [which is related to the cause of action] may be sufficient to support *in personam* jurisdiction over a non-resident defendant." *Hughs, supra*, 490 A.2d at 1146. *See also Fisher v. Bander*, 519 A.2d 162, 164 (D.C. 1986). Thus, "whether a court may constitutionally assert *in personam* jurisdiction over a non-related defendant [such as the defendants in this case] depends upon "the relationship among the defendant, the forum, and the litigation . . ." *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L. Ed. 2d 683, 698 (1977), quoted in *Hughs, supra*,490 A.2d at 1146.

Appendix D

Contrasting the present case with *Hughs*, as well as with *AMAF*, *Price*, *Ross*, and *Ramamarti*, it is clear that plaintiffs have not met their burden of showing that G & R, Ltd., was "doing business" in D.C. within the meaning of § 334. Its contacts with D.C. are *de minimis* in comparison with the D.C. contacts of the defendants in those cases. G & R, Ltd., is a Virginia, not a D.C. corporation. Its principal place of business is not D.C., but Virginia. It has no office, is not licensed to do business and has no registered agent in D.C. Neither of its principal employees, Dr. Gahres and Dr. Radice, have admitting privileges at any D.C. hospital. Although Dr. Gahres and Dr. Radice practiced medicine in D.C. up to two years before the events at issue here, there is no evidence that they did so on behalf of the Virginia corporation, or that the Virginia corporation was ever licensed to do business in D.C.

Certainly, the fact that Dr. Gahres and Dr. Radice, agents of G & R, Ltd., have not relinquished their licenses to practice medicine in D.C. is not enough to show that G & R, Ltd., is "doing business" in D.C. "[I]t is the actual practice of a profession . . ." and not the possession of the right to practice that brings a person within the jurisdiction of a . . . court." *Ghanem v. Kay*, 624 F. Supp. 23, 25 (D.D.C. 1984).

Nor does the corporation actively solicit business here through the doctors or through HMO's. Indeed, at least with respect to BCBSNCA, the doctors appear to have discouraged D.C. business by indicating they do not practice here and, apparently untruthfully, are not licensed to practice medicine here.

Appendix D

No real advertising takes place in D.C. The doctors' modest Yellow Pages listings give their Virginia address and specialty only and do not reveal that they are licensed in D.C. Dr. Radice's listing at the IMF Health Center, which also does not reveal that he is licensed in D.C., provides little more. Indeed, these listings are merely passive, not pervasive, continuous or substantial. *See Ramamurti, supra*, 454 F. Supp. at 413. Moreover, there is no evidence that the listings, or for that matter the relationship with BCBSNCA, have brought G & R, Ltd., any more than *de minimis* business from D.C.[29]

In addition, the plaintiffs have not established that G & R, Ltd., derives any revenue from sales of medical services in D.C. While the corporation apparently has a small proportion of D.C. patients who are D.C. residents, the revenues derived therefrom come from medical

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29. *Ghanem* held that where, as here, a doctor does not actually practice in a forum, where the doctor has not aggressively sought patients in the forum and where the plaintiff did not consult the doctor as a result of his or her *in-forum* activities, possession of a license to practice and a listing in the forum's phone book "is not sufficient to meet the due process requirements that limit jurisdiction under all long-arm statues." 624 F. Supp. at 25 n.6. *See also Cornwell v. C.I.T. Corp.*, 373 F. Supp. 661, 663 (D.D.C. 1974) (listing Virginia address in D.C. phone book not sufficient for "transacting business."). Moreover, even if some relationship could be found between defendant's license or listing and the injury to plaintiff, it would simply be too tenuous to satisfy the requirements of due process. *Bayles, supra*, 636 F. Supp. at 855. Compare *Daniels v. Kanof*, 116 Daily Wash. L. Rptr. 2053, 2056-2057 (D.C. Super. Ct. October 4, 1988).

services provided in Virginia, not D.C. The same is true of patients who, although not D.C. residents, have at some point worked in D.C. While plaintiffs attempt to rely on telephone conversations between employees of G & R, Ltd., in Virginia and patients in D.C., there is no indication that the patients are charged for these calls. In any event, as discussed below at pp. 36-40, the conversations with patients in D.C. do not project the doctors into this jurisdiction. Nor does the teaching of G.W. medical students provide revenue derived from the sales of services in D.C., since the teaching is done entirely in Virginia. Indeed, there is no evidence that Dr. Gahres or Dr. Radice are paid for this teaching, nor that the doctors are acting as agents of the corporation when acting in that capacity.

Although G & R, Ltd., has received income as a result of Dr. Gahres serving as an adviser to BCBSNCA, the amounts received are insubstantial, ranging from $645.00 to $2,265.00 annually, and almost certainly reflect an activity which is sporadic, not continuous. Moreover, plaintiffs have made no showing that Dr. Gahres performed these services in D.C. In fact, they have not shown that his advice related to D.C. residents or to D.C. employees, or addressed medical treatment rendered in D.C. Nor have they shown that Dr. Gahres solicited this advisory business, let alone that he solicited it in D.C. Instead, plaintiffs have merely relied on the assertion that BCBSNA is a corporate entity incorporated in D.C. — a fact that even if established would not by itself be sufficient.

Appendix D

While Dr. Gahres and Dr. Radice enter D.C. for Grand Rounds and meetings of the Washington Gynecological Society with a frequency similar to the A.H. Robins representatives, their purpose is entirely different. There is no evidence that they are acting as agents of G & R, Ltd., with respect to either of these activities; that the corporation derives any economic benefit from these activities; that participation in the activities is in any way designed to solicit business for the corporation; or that these activities are in any other way directed at advancing the corporation's objectives, rather than the personal objectives of the doctors.

Even if these points had been established, however, participation by Dr. Gahres and Dr. Radice in these activities would not provide a basis for exercising jurisdiction under § 334. Grand Rounds and attendance at meetings of the Washington Gynecological Society are completely unrelated to the cause of action in this case. As *Hughes* made clear, where the cause of action is unrelated to the in-forum activities, two or three visits a month by corporate agents does not constitute substantial activity, particularly when no economic benefit is derived therefrom. This is particularly so where, as found here, the primary purpose of these visits is continuing medical education. *See Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 417-418, 104 S. Ct. 1868, 1873-1874, 80 L. Ed. 2d 404, 413-414 (1984).

In sum, the court concludes that G & R, Ltd., has minimal contacts with D.C. Further, it concludes that

the few contacts that it does have are not the kind of continuous or substantial contacts necessary to establish that it is "doing business" in D.C. within the meaning of § 334.[30]

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30. In connection with their claim that G & R, Ltd., is "doing business" in D.C., as well as their claim that all defendants were "transacting business" in accordance with § 423(a)(1), plaintiffs rely on *Braman v. Mary Hitchcock Memorial Hospital*, 631 F.2d 6 (2d. Cir. 1980); *Ledford v. Central Medical Pavilion, Inc.*, 531 F. Supp. 793 (W.D. Pa. 1982); and *Woodward v. Keenan*, 261 N.W.2d 80 (Mich. Ct. App. 1977). Not only are none of these decisions binding on this court; all three are readily distinguishable. Contrary to plaintiffs' assertion that *Braman* held that jurisdiction in a Vermont malpractice action was proper over a New Hampshire clinic, the Second Circuit simply remanded the case to the District Court for an examination of contacts possibly establishing a basis for jurisdiction. In *Ledford*, the District Court held that an Ohio doctor was engaged in a "continuous course of conduct for pecuniary benefit" in Pennsylvania as a result of his extensive testimony and other litigation-related activities in connection with Pennsylvania litigation. Moreover, the suit itself was brought by a Pennsylvania resident, and the doctor received substantial income from the treatment of Pennsylvania residents. Plaintiffs here are unable to establish any of these facts. The same is true of *Woodward*, where the court, in dictum, suggested that out-of-state doctors might become subject to the jurisdiction of Michigan courts if they systematically or on a continuing basis encouraged Michigan residents to utilize their services. Particularly notable is that both *Ledford* and *Woodward* dealt with possible jurisdiction in a court located where the plaintiff resided, unlike the present case, where jurisdiction is sought by plaintiffs in a court where neither plaintiffs or defendants reside.

Appendix D

B. *Long Arm Statute*

Having concluded that the court has an insufficient basis for exercising jurisdiction over the corporate defendant under the "doing business" statute, the court now turns to D.C. Code § 13-423, the Long Arm Statute. Here, plaintiffs assert jurisdiction under § 423(a)(1), transacting business in D.C.; § 423(a)(3), causing tortious injury in D.C. by an act or omission in D.C.; and § 423(a)(4), causing tortious injury in D.C. by an act or omission outside D.C. if the defendant has certain other contacts with D.C.

(1) *§ 423(a)(3)*

The court begins with § 423(a)(3), because this is most easily resolved. Section 423(a)(3) permits the exercise of jurisdiction over defendants who have caused tortious injury in D.C. by an act or omission in D.C. In this connection, plaintiffs rely on the phone call placed by Mrs. Bourdin from her office in D.C. to the defendants' office in Virginia on the day of the automobile accident. Plaintiffs claim that the defendants committed an act or omission in D.C during that phone call. The court concludes that § 423(a)(3) cannot serve as the basis of *in personam* jurisdiction over defendants, because any act or omission of the defendants during the phone call occurred in Virginia, not in D.C.[31]

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31. Even if the court found that an act or omission during the phone call occurred in D.C., plaintiffs would still lack a (Cont'd)

Appendix D

The longstanding case law in this jurisdiction, albeit binding only on the federal courts here, provides that for purposes of § 423(a)(3), an act or omission which occurs during a phone conversation is deemed to occur where the defendant is located. Thus, in *Margoles v. Johns*, 157 U.S. App. D.C. 209, 214-215, 483 F.2d 1212, 1217-1218 (1973), the court declined to "delve into a magical mystery tour of 'projecting presences,'" and found that an allegedly defamatory phone call to D.C. placed by a defendant located in Wisconsin could not provide a basis for jurisdiction in D.C. under § 423(a)(3). The court wrote: "Were we to develop any such "presence" doctrine we would be thwarting the plain language and normal interpretation of § [423(a)(3)], and creating needless ambiguities which have no place in a statute as reasonably constructed" as it is. *Id.* at 214, 483 F.2d at 1217. *Accord, Tavoulares v. Comnas*, 232 U.S. App. D.C. 17, 18-19, 720 F.2d 192, 193-194 (1983); *Security Bank v. Tauber*, 347 F. Supp. 511, 516-517 (D.D.C. 1972). Under this reasoning, any acts or omissions attributable to the defendants during the phone call to Virginia occurred in Virginia, not in D.C.

Without discussing the authority from D.C. courts, plaintiffs cite the court to *McGee v. Rickhof*, 442 F. Supp.

(Cont'd)
sufficient basis for asserting jurisdiction over the individual defendants pursuant to § 423(a)(3). Neither doctor spoke with Mrs. Bourdin by phone on the day of the accident, and plaintiffs have provided the court with no evidence that either doctor's instructions were conveyed through the receptionist who did speak with Mrs. Bourdin. *See supra*, pp. 4-5.

1276 (D. Mont. 1978).[32] In *McGee*, a Montana court ruled that it could exercise jurisdiction over a Utah doctor who had treated a Montana resident in Utah and who had never entered Montana. The basis for jurisdiction, as found by the court, was advice given by the doctor in Utah during a phone call placed from Montana by the patient's wife after the patient had returned home to Montana. The court held that the doctor's advice was given in Montana, despite his physical presence in Utah.

McGee has little persuasive authority given the long-standing rulings in this jurisdiction. Further, the provision of the Montana Long Arm Statute interpreted in *McGee* is substantively different from § 423(a)(3). The statutory provision at issue in *McGee* gave Montana courts jurisdiction over claims arising from a defendant committing "any act which results in accrual within this state of a tort action." *Id.* at 1277. In contrast, § 423(a)(3) gives D.C. courts jurisdiction "as to a claim for relief

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32. Plaintiffs also rely on *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972). *Wright*, however, is not helpful to plaintiffs. There, the Ninth Circuit held that the mailing of a prescription from South Dakota to Idaho did not constitute the commission of a tortious act in Idaho. Moreover, the Ninth Circuit went on to express its concern that making medical malpractice a "portable tort" which occurs wherever the patient goes and the consequences are felt would ill-serve the public by making doctors reluctant to treat patients who might travel to other jurisdictions. This case well-illustrates the validity of that concern. Thus, *Wright* concluded, "in the case of personal services [,] focus must be on the place where the services are rendered." 459 F.2d at 289.

arising from [a] person's causing tortious injury in [D.C.] by an act or omission in [D.C.]." Thus, § 423(a)(3) is more specific in requiring that the negligent act or omission occur in D.C.

In determining the reach of § 423(a)(3) *Margoles* looked at statutes which vest jurisdiction "when the only contact with the state is the injurious consequence of an act or omission committed elsewhere." *Supra*, 157 U.S. App. D.C. at 213, 483 F.2d at 1216. The language of the Montana statute would be consistent with this broad exercise of jurisdiction. The D.C. Circuit concluded, however, that when Congress passed § 423(a)(3), it did not intend that it would reach the full constitutional limit of *in personam* jurisdiction reflected in such statutes. Rather, the court found, § 423(a)(3) is "a precise and intentionally restricted tort section whose language and history mandate a different result." *Id.* at 216, 483 F.2d at 1219.[33]

In the end, the court concludes that *McGee* should not be followed in the face of the different language of

33. *Margoles* concluded that Congress intended through passage of the D.C. Long Arm Statute to provide D.C. with jurisdiction identical to Maryland and Virginia and that its interpretation of § 423(a)(3) was consistent with the then prevailing law in those neighboring states. *Id.* at 212-213, 217-218, 483 F.2d at 1215-1216, 1220-1221. Later decisions in those jurisdictions show that the *Margoles'* interpretation of § 423(a)(3) is still consistent with Maryland and Virginia. *See Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 318 (D.Md. 1983); *Navis v. Henry*, 456 F. Supp. 99, 101 (E.D.Va. 1978).

§ 423(a)(3) and the longstanding principle articulated in *Margoles*. Therefore, the court declines to permit plaintiffs to base jurisdiction on § 423(a)(3)[34] and turns to the other two bases for jurisdiction asserted by plaintiffs under the Long Arm Statute.

(2) *§ 423(a)(4)*

(a) *Plus factors*

Under § 423(a)(4) a D.C. court may exercise jurisdiction over a defendant who causes tortious injury in D.C. by an act or omission outside D.C. if the defendant has certain other specific contacts with D.C. Those contacts, referred to as "plus factors," are alternatively: (1) regularly doing or soliciting business in D.C.; (2) engaging in any other persistent course of conduct in D.C.; or (3) deriving substantial revenue from goods used or consumed, or services rendered in D.C.

While the D.C. Court of Appeals appears to have had little occasion to address the "plus factors" of § 423(a)(4), the D.C. Circuit has ruled that substantially less connection with D.C. is required under those provisions than under the "doing business" test of § 334. *Crane, supra*, 259 U.S. App. D.C. at 234, 814 F.2d at

34. Even if the plaintiffs could establish that the phone call was an act or omission of the defendants in D.C., plaintiffs could not meet the second requirement under § 423(a)(3) — that the defendants caused tortious injury in D.C. This issue is discussed at length below in the context of § 423(a)(4). *See, infra*, pp. 45-52.

763; *Steinberg v. Int'l Criminal Police Org.*, 217 U.S. App. D.C. 365, 369, 672 F.2d 927, 931 (1981). The D.C. Circuit has also concluded that a "plus factor" need not be related to the claim at issue. Thus, the injury at issue need not have resulted from the doing or soliciting of business, the persistent course of conduct, or the deriving of revenue. *Id. See also Gatewood v. Fiat*, 199 U.S. App. D.C. 238, 242-243, 617 F.2d 820, 824-825 (1980). Nonetheless, § 423(a)(4) is not without its limits and was not intended "to be coextensive with the Constitution's due process limit." *Parsons, supra*, 580 A.2d at 1331; *Crane, supra*, 259 U.S. App. D.C. at 233, 814 F.2d at 762.

With these principles in mind, the court examines whether the facts of this case are sufficient to establish the existence of any one of the "plus factors." Although the requirements of § 423(a)(4) are less than the requirements of § 334, the court nonetheless finds the record insufficient to establish that any of the defendants "derive[s] substantial revenue from goods used or consumed, or services rendered in D.C." This case does not involve goods used or consumed in D.C. Moreover, as discussed in connection with § 334, *supra*, pp. 33-34, there is no evidence that either G & R, Ltd., Dr. Gahres or Dr. Radice derives *any* revenue from services rendered here. As also discussed in connection with § 334, *supra*, pp. 31-34, plaintiffs cannot show that defendants "regularly do [ ] or solicit [ ] business" here.

Thus, the court must examine the third alternative "plus factor" to determine whether the defendants have

engaged in a "persistent course of conduct" in D.C. The D.C. Court of Appeals has defined "a persistent course of conduct" as consisting of contacts with the jurisdiction of a regular and continuing nature which have existed for a long or longer than usual time: *Parsons, supra,* 580 A.2d at 1330. *See also Steinberg, supra,* 217 U.S. App. D.C. at 369, 672 F.2d at 931; *Willis, supra,* 441 F. Supp. at 1241; and *Security Bank, supra,* 347 F. Supp. at 515. *Parsons* held that an attorney who had handled only three cases in D.C. over a ten year period had not engaged in a persistent course of conduct here, particularly since all three cases had been stayed while the litigation proceeded in Virginia and represented an insignificant fraction of the attorney's legal business.

Parsons appears to represent the only opportunity of the D.C. Court of Appeals to determine whether a particular set of facts constitutes a persistent course of conduct within § 423(a)(4). The D.C. Circuit addressed the issue in *Steinberg* and found that Interpol, the defendant, which was headquartered in France, had engaged in a persistent course of conduct in D.C. by regularly sending information to and receiving information from its American liaison, the United States National Central Bureau, located in D.C. at the Justice Department. *Compare Security Bank, supra,* 347 F. Supp. 511, where the District Court found that the plaintiff had not provided sufficient evidence of the regularity with which the defendant, a Maryland Real Estate developer, used a D.C. title company for his

transactions, and thus had not established that the developer engaged in a persistent course of conduct here.[35]

In connection with the "doing business" test of § 334, the court concluded that G & R, Ltd., was not engaging in continuous or substantial activities in D.C. *See supra*, pp. 26-35. An examination of the same facts analyzed in connection with the "doing business" test leads the court to conclude that there is also no basis for a finding that G & R, Ltd. has engaged in a persistent course of conduct in D.C.

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35. The Fourth Circuit appears to have broadly interpreted the "persistent course of conduct" standard so as to bring out-of-state defendants within their jurisdiction. In *First Am. First, Inc. v. National Ass'n of Bank Women*, 802 F.2d 1511 (4th Cir. 1986), the Fourth Circuit held that a non-profit corporation with 28,000 members headquartered in Chicago had engaged in a persistent course of conduct in Virginia as a result of bi-monthly mailings of its journal, annual mailings of its national directory, and annual distribution of a "call to convention" to its 1,150 Virginia members, as well as annual distribution of operating manuals to its autonomous state and local groups, including those in Virginia. *See also Topik v. Catalyst Research Corp.*, 339 F. Supp. 1102 (D. Md. 1972), *aff'd* 473 F.2d 907, and *cert. denied*, 414 U.S. 910, 94 S. Ct. 231, 38 L. Ed. 2d 148 (1973), where the District Court found that Pennsylvania residents who were directors of two Maryland corporations had engaged in a persistent course of conduct in Maryland by coming into Maryland each year for five years for the annual stockholder's meeting and the annual board of director's meeting for each corporation.

On the other hand, the court finds the evidence sufficient to conclude that Dr. Gahres and Dr. Radice, as opposed to G & R, Ltd., have engaged in a persistent course of conduct in D.C. They have been members of the Washington Gynecological Society for many years and have attended meetings six to eight times a year. In addition, in the thirty months for which plaintiffs provided figures, Dr. Gahres attended Grand Rounds fifty-four times and Dr. Radice twenty-two times. Combining their trips into D.C. for Grand Rounds and for meetings of the Washington Gynecological Society, Dr. Gahres would appear to be entering D.C. two to three times a month and Dr. Radice would appear to be entering D.C. between one and two times a month. In *Hughs,* the Court of Appeals found that the entry into D.C. of A.H. Robins sales representatives every two or three weeks constituted "continuous" activity, although not "substantial" enough for the "doing business" test. With that as guidance, the court concludes that Dr. Gahres and Dr. Radice are also engaging in "continuous" D.C. activity of a regular and long-standing nature sufficient to meet the *Parsons* test defining a "persistent course of conduct." Thus, the court concludes that this statutory criteria for a plus factor has been met.

The court finds this conclusion troublesome. The monthly or bi-monthly nature of the doctors' D.C. contacts amounts to the same frequency as the contacts of many suburbanites who visit D.C. several times a month for entertainment or shopping. It is difficult to believe that those suburbanites would expect to be

haled into a D.C. court on a matter in no way related to the specific entertaining or shopping. It is also troublesome because D.C. has so little interest in a dispute between a patient who resides in Virginia and her doctors who practice in Virginia and rendered all of their treatment in that jurisdiction. As the Court of Appeals wrote in *Hughs:* "Although [D.C.] has a general concern with protecting its residents from defective consumer products, it has no reason to add to its crowded court dockets a suit by a Virginia plaintiff against a Virginia defendant on a cause of action which arose entirely in Virginia." *Supra*, 490 A.2d at 1146 n.9. *See also World-Wide Volkswagen, supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. at 498; *McGee, supra*, 355 U.S. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226. The negligible interest of D.C. in this litigation raises a substantial question about whether the exercise of jurisdiction based on this "persistent course of conduct" might violate due process, especially where any injury is unrelated to that conduct.

b. *Causing Injury in D.C.*

The court, however, need not finally determine whether jurisdiction over defendants based upon this persistent course of conduct would violate due process, because plaintiffs have failed to meet a different requirement of § 423(a)(4), i.e., that the defendants have "caus[ed] tortious injury in [D.C.] by an act or omission outside [D.C]." Defendants persuasively argue that even assuming *arguendo* that they were negligent, their negligence did not cause tortious injury to the plaintiffs

in D.C. If that is so, it makes no difference that they engaged in a "persistent course of conduct" here. *Gandel, supra*, 302 U.S. App. D.C. at 363, 997 F.2d at 1565.

As an initial matter, it should be clear that plaintiffs cannot rely upon injury caused by the rear-end collision on October 29, 1990, in the parking lot of the IMF as their basis for asserting jurisdiction over defendants under § 423(a)(4). Rather, they must establish that Dr. Gahres, Dr. Radice or G & R, Ltd., caused injury to the plaintiffs in D.C. In other words, it is the actions of the doctors and the corporate defendant which the plaintiffs must look to in asserting jurisdiction, not the actions of the driver of the car that hit the Bourdins.

The fact that some harm occurs in a jurisdiction is not alone sufficient under § 423(a)(4) to find that a defendant "caused injury" to a plaintiff in that jurisdiction. *See American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 433-434, (2d. Cir. 1971); *Van Essche v. Leroy*, 692 F. Supp. 320, 325, (S.D.N.Y. 1988); *Granada Television Int'l, Ltd. v. Lorendy Pictures Int'l*, 606 F. Supp. 68, 71 (S.D.N.Y. 1984), all three of which were interpreting statutory language similar to § 423(a)(4). *See also First Chicago Int'l v. United Exchange Co.*, 655 F. Supp. 787, 793 (D.D.C. 1987), *aff'd* in part and *rev'd* in part, 267 U.S. App. D.C. 27, 836 F.2d 1375 (1988). Rather, the issue of what jurisdiction should be viewed as the location of an injury varies from case to case. An injury which has no

physical impact is most likely to be suffered where a defendant lives or does business.[36] On the other hand, physical injuries have repeatedly been held to occur where the injury was originally inflicted, rather than where the consequences are felt.[37]

Injuries suffered from malpractice, such as alleged here, begin with the injury to the body. Put succinctly, the alleged medical negligence causes bodily injury, which may, as a consequence, lead to secondary physical injuries, pain, emotional anguish, and economic loss. Thus, in *Ussery v. Kaiser Found. Health Plan, Inc.*, 647 A.2d 778, 781 (D.C. 1994), for example, a medical malpractice case, the injuries to the plaintiff, a Virginia

36. In *Crane, supra*, 259 U.S. App. D.C. at 231, 814 F.2d at 760, the D.C. Circuit concluded that in defamation actions, the injury "is felt with the greatest force where the plaintiff lives." In *Akbar v. New York Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1990), also a defamation action, the District Court found that plaintiff would suffer injury to his professional standing where he had his principle place of business. In *Aiken v. Lustine Chevrolet*, 392 F. Supp. 883, 886 (D.D.C. 1975), where a plaintiff sued for damages to her credit rating and for mental anguish resulting from fraudulent misrepresentations in Maryland, the District Court ruled that " [s]uch alleged injuries could only have been sustained in [D.C.]," where the defendant resided.

37. *See, e.g., Berwyn Fuel, Inc. v. Hogan*, 399 A.2d 79, 80 n.2 (D.C. 1979) (injury occurred in Maryland, where the automobile accident at issue occurred); *accord, Perry v. Criss Bros. Iron Works, Inc.*, 741 F. Supp. 985 (D.D.C. 1990); *Ross, supra*, 736 F. Supp. at 289 (injury occurred in Virginia, where allegedly defective tool struck plaintiff).

resident, as a result of alleged medical malpractice in Virginia, were found to have been caused in Virginia.

The importance of the original physical injury in determining where the tortious injury has been caused cannot be overstated. If elements such as secondary physical injuries, pain or emotional distress determined where the injury had been caused, thus permitting the exercise of jurisdiction over a defendant, jurisdiction could be created in forums simply by a plaintiff entering that jurisdiction and deteriorating physically or suffering pain or emotional distress while there. This would be an impractical standard for exercising jurisdiction and would destroy the ability of defendants to foresee where they might be haled into court.

The issue of where an injury should be found to have occurred was discussed at length in the opinion of *Leaks v. Ex-Lax, Inc.*, 424 F. Supp. 413 (D.D.C. 1976), cited with approval in *Guerva v. Reid*, 598 A.2d 1157, 1159 n.2 (D.C. 1991). In *Leaks*, a D.C. resident, while on a business trip to Arizona, bought a package of Ex-Lax and took two of the pills. Within hours, she suffered a severe reaction necessitating hospitalization and other medical treatment in Arizona.

The D.C. resident sought to sue Ex-Lax here, asserting under § 423(a)(4) that she had suffered tortious injury here, as well as in Arizona. Specifically, she alleged that she "suffered extreme physical and mental injury on a continuing basis in [D.C.], as well as severe financial injury from the fact that the physical

injury prevented her from further carrying on her business activities and resulted in the loss of substantial income. . ." *Leaks, supra*, 424 F. Supp. at 415.

The District Court rejected the plaintiff's argument that these allegations were sufficient to establish that Ex-Lax had "caused tortious injury in [D.C.]," as required to exercise jurisdiction under § 423(a)(4). In rejecting this argument, the court looked to the impractical effects of construing § 423(a)(4) in that manner. Specifically, the court wrote: "To allege that plaintiff's continuing pain shifts the site of the injury to [D.C.] would also mean that *any* jurisdiction to which plaintiff has travelled since she consumed the pills and which has a similar long-arm provision would be an appropriate forum for this lawsuit." *Id.* The court's reasoning in *Leaks* appears precisely on point in this case.

The *Leaks* decision, however, does not stand alone. *Leaks* relied on the reasoning of a New York state trial court opinion, *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. 1967), which has been cited with approval by a number of subsequent decisions.[38] The court in *Black* was interpreting the breadth of a New York state statute similar to § 423(a)(4), permitting the courts to exercise personal jurisdiction when a tortious act committed outside the

38. *See, e.g., American Eutectic, supra*, 439 F.2d at 432-435; *Van Essche, supra*, 692 F. Supp. at 326; *Granada Television, supra*, 606 F. Supp. at 71.

state caused injury to a person or property within the state.[39] As the court recognized in *Black*, persons injured as a result of negligence have not only personal injury, but also resultant damage, including long periods of convalescence and economic losses. But, the court found, the language of the jurisdictional statute at issue "looks to the imparting of the original injury . . . and not resultant damage." *Black, supra*, 55 Misc. 2d at 401, 285 N.Y.S. at 229. To hold otherwise, the court reasoned, "would open a veritable Pandora's Box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York." *See also Perry, supra*, 741 F. Supp. 985, holding that a Survival Act claim resulting from an accident in Maryland could not be brought in D.C. because financial losses here were simply a measure of damages. Thus, as indicated by *Leaks* and *Black*, the place of injury would normally be "the place where the critical events associated with the dispute took place." *American Eutectic, supra*, 439 F.2d at 433 (citation omitted). "In the case of personal services[,] focus must be on the place where the services are rendered." *Wright, supra*, 459 F.2d at 289.

While neither *Leaks* nor *Black* involved a medical malpractice claim, their reasoning is applicable to such

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39. The statute limited the exercise of jurisdiction to instances where a defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *Black, supra*, 55 Misc. 2d at 400, 285 N.Y.S.2d at 228.

a claim. The critical events in this case occurred in Virginia, where the medical services were rendered, not in D.C. It was in Virginia, not D.C., where the doctors allegedly failed to intervene and stop the adverse physical consequences purportedly caused by the automobile accident. It is the failure to stop the adverse physical consequences that is the original injury here for purposes of § 423(a)(4). While at work in D.C., Mrs. Bourdin may have experienced secondary consequences deriving from defendant's failure to intervene, including pain, emotional distress, and incremental physical deterioration ultimately leading to the stillbirth and the sensitization of Mrs. Bourdin's blood. These, however, are not the critical injuries for § 423(a)(4) purposes, but only secondary injuries and damages flowing from the original injury which occurred in Virginia.

Such a conclusion appears particularly appropriate here, since the Bourdins are Virginia residents and the consequences of any negligence would be expected to be felt with the greatest weight where they live. The plaintiffs, however, stress the importance of D.C. as the place where both the Bourdins are employed. As held in *Ussery, supra*, 647 A.2d at 781, however, "[t]he fact that a plaintiff is employed in [D.C.] . . . carries very little weight when [the employment] is not related to the alleged injury."

Ussery involved a Maryland resident who received allegedly negligent obstetrical treatment in Maryland by a physician from a health plan she enrolled in through her employment in D.C. Although the context of the

holding was *forum non conveniens*, the court finds its holding of significance for jurisdictional determinations also. If employment carries little weight in the context of *forum non conveniens*, it should carry even less weight in the jurisdictional context. As the term suggests, the doctrine of *forum non conveniens* involves merely issues of convenience, where courts have broad discretion. Jurisdiction involves no discretion, but rather a determination of whether a court has any right to bring a party before it in the first instance.

Thus, the court finds that for purposes of § 423(a)(4), the injuries to Mrs. Bourdin occurred not in D.C., but in Virginia, where the critical events associated with this case took place. The same logic applies to bar this court's jurisdiction under § 423(a)(4) over claims on behalf of the baby's Estate under D.C.'s Survival Act, D.C. Code § 12-101 (1995 Repl.)[40] and, if such a claim has been asserted, the claims of the heirs under D.C.'s Wrongful Death Act.[41] With respect to Mr. Bourdin's loss of

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40. The Survival Act permits the Estate of a decedent to sue for bodily injuries and pain and suffering of the decedent up to the time of death, pecuniary loss as a result of the injuries (such as medical or funeral expenses) and the amount the deceased would have accumulated over her lifetime. *See Standardized Civil Jury Instructions for the District of Columbia*, No.'s 14-1, 14-3 (1981).

41. At oral argument, the defense asserted that the Complaint does not include a claim under D.C.'s Wrongful Death Act, D.C. Code § 16-2701 through 2703 (1989 Repl.). This would appear correct. Other than the caption of the Complaint,

(Cont'd)

consortium claim, it appears equally clear that the situs of injury would be Virginia. Since both parties are residents of Virginia, Virginia is "the situs of their marital domicile." *Stutsman v. Kaiser Foundation Health Plan, Inc.*, 546 A.2d 367, 373-374 (D.C. 1988).

In sum, while Dr. Gahres and Dr. Radice may have engaged in a persistent course of conduct in D.C. through meetings of the Washington Gynecological Society and attendance at Grand Rounds, neither doctors' actions caused injury to the plaintiffs in D.C. Thus, plaintiffs cannot rely on § 423(a)(4) to obtain jurisdiction over them.

(3) *§ 423(a)(1) "Transacting Business"*

The court turns finally to plaintiffs' claim that jurisdiction can be based on § 423(a)(1), the "transacting business" provision of D.C.'s Long Arm Statute. This

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which lists Mr. and Mrs. Bourdin as suing on "behalf of the heirs of Baby Girl Etchebarne-Bourdin," there is no further reference to the heirs in the Complaint. That includes the final WHEREFORE clause, setting out the damages sought by each party. In addition, D.C. Code § 16-2702 requires that a wrongful death action be brought "within one year after the death of the person injured." The present action was not brought within one year, and this requirement has been strictly construed. *See Group Health Ass'n Inc. v. Gatlin*, 463 A.2d 700 (D.C. 1983). *See also Perry, supra*, 741 F. Supp. at 986. (D.C.'s Wrongful Death Act "creates a cause of action only for deaths caused by injuries occurring within [D.C.].")

provision requires less of a nexus between the defendant and D.C. than the "doing business" test. *Trerotola, supra,* 601 A.2d at 63; *Cohane v. Arpejia-California, Inc.,* 385 A.2d 153, 158 (1978), *cert. denied,* 439 U.S. 980, 99 S. Ct. 567, 58 L. Ed. 2d 651 (1978). To fall within § 423(a)(1), a non-resident defendant need not have been physically present in D.C.*Mouzavires v. Baxter,* 434 A.2d 988, 992 (1981), *cert. denied,* 455 U.S. 1006, 102 S. Ct. 1643, 71 L. Ed. 2d 875 (1982). Moreover, under certain circumstances, a single act may be sufficient to constitute transacting business. *Id.* Indeed, § 423(a) (1) permits the exercise of personal jurisdiction over non-resident defendants to the full extent permitted by the due process clause. *Id.; Environmental Research Int'l Inc. v. Lockwood Greene Eng'r, Inc.,* 355 A.2d 808, 810-811 (1976).

To justify personal jurisdiction, due process requires "certain minimum contacts" between the non-resident and the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 99 (1945). *See also Trerotola, supra,* 601 A.2d at 64; *Fisher, supra,* 601 A.2d at 64; *Mouzavires, supra,* 434 A.2d. at 993; and *Environmental Research, supra,* 355 A.2d at 811. Regardless of the minimum contacts, however, there are two other predicates to the exercise of jurisdiction under § 423(a)(1). One, derived from § 423(b), is that the claims must arise from the defendant's contacts with D.C. *Everett, supra,* 628 A.2d at 107; *Cockrell v. Cumberland Corp.,* 458 A.2d 716, 717 n.2

(1983); *Berwyn Fuel, supra,* 399 A.2d at 80; *Cohane, supra,* 385 A.2d at 158. The other is that the defendant must have undertaken "some affirmative act to bring himself or herself within the jurisdiction." *Everett, supra,* 628 A.2d at 107; *Trerotola, supra,* 601 A.2d at 64-65; *Mouzaviers, supra,* 434 A.2d at 993; *Hummel v. Koehler,* 458 A.2d 1187, 1190 (1983); *Berwyn Fuel, supra,* 399 A.2d at 80; *Cohane, supra,* 385 A.2d at 158.

The contacts relied upon must manifest a deliberate and voluntary, rather than a fortuitous connection with the forum. *Mouzavires, supra,* 434 A.2d at 995. They cannot have had their source in the "unilateral activity of those who claim some relationship with a non-resident defendant." *Hanson v. Denkla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1229, 2 L. Ed. 2d 1283, 1298 (1958). Rather, the contacts must involve conduct by which a defendant "purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id. See also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 528, 542 (1985).

With these principles in mind, the court turns to the contacts which would be meaningful for a determination of whether defendants were "transacting business" in D.C. within the context of § 423(a)(1). To establish that defendants were "transacting business," plaintiffs have relied on the same panoply of factors which they cited to establish that the defendants were "doing business" within D.C. or had the necessary "plus factors" for jurisdiction under § 423(a)(4).

This reliance is misplaced. Rather, the court must look to the contacts that are specifically related to the claims here. Attendance at Grand Rounds or at meetings of the Washington Gynecological Society, teaching, or acting as a consultant to BCBSNCA, regardless of where or how often such activities take place, are not relevant to this inquiry because the present claims do not derive from any of those activities. For the same reason, the defendants' relationship with other patients who may be D.C. residents or employed in D.C. is not relevant.

In the end, the court concludes that the only conceivably relevant contacts for purposes of § 423(a)(1) would be (1) the phone call from Mrs. Bourdin to the defendants' Virginia office on the day of the accident; (2) the listing of the doctor's name in the Yellow Pages and at the IMF Health Center; and (3) the D.C. medical licenses held by both Dr. Gahres and Dr. Radice.

The court finds that the phone call from Mrs. Bourdin to the doctors' office in Virginia cannot be used as a basis for minimum contacts. The call was initiated by Mrs. Bourdin, not defendants. To bring the defendants within the jurisdiction of the court based on this act would be contrary to the principle that jurisdiction must be based on a deliberate, voluntary act of a defendant.

This ruling is consistent with the many cases in this jurisdiction which have found that a non-resident defendant was transacting business in D.C. for

jurisdictional purposes based, at least in part, on a phone call. Many of those cases have involved a suit for unpaid legal fees brought by a D.C. lawyer in a D.C. court against a client from another jurisdiction. The disputes have arisen after the non-resident client made a call to the D.C. lawyer in D.C. seeking legal services to be performed in D.C. *See, e.g., Fisher, supra,* 519 A.2d 162; *Mouzavires, supra,* 434 A.2d 988; and *Hummel, supra,* 458 A.2d 1187. Thus, the non-D.C. party deliberately and voluntarily sought out services to be performed on his behalf in D.C., and thus subjected himself to the jurisdiction of a D.C. court. This is contrary to the present case, where a party in D.C. called a doctor's office in Virginia and later used the call to argue for jurisdiction in D.C., rather than in Virginia. As the Court of Appeals wrote in *Environmental Research,* "a plaintiff cannot rely on its own activities, rather than those of a defendant, to establish the requisite minimum contacts for personal jurisdiction." *Supra,* 355 A.2d at 812.

This principle is well-illustrated by *Bueno v. La Compania Peruana Radiodifusion,* 375 A.2d 6 (1977), where the plaintiff, a D.C. corporation, sued a Peruvian corporation for negligence and breach of contract. The D.C. corporation had contacted the Peruvian corporation to provide it services in Peru. Although an agent of the Peruvian corporation had on one occasion come to D.C. to deliver a copy of the contract, the Court of Appeals found no basis for jurisdiction in D.C., noting that the defendant had not initiated or pursued the contract negotiations in D.C. and had not provided services here. Thus, the defendants' actions did not show purposeful,

affirmative activity within D.C. *See also Blair v. Norwegian Caribbean Lines*, 622 F. Supp. 21, 23 n.3 (D.D.C. 1985), where the District Court concluded: "Plaintiffs' own unilateral actions [of initiating a phone call to defendant in Florida] cannot provide a basis for asserting jurisdiction over a non-resident defendant."

Plaintiffs also argue that the fact that Dr. Gahres and Dr. Radice are licensed to practice medicine in D.C. supports the exercise of jurisdiction over them. As explained above, however, "it is the actual practice of a profession . . . and not the possession of the right to practice that brings a person within the jurisdiction of a . . . court." *Ghanem, supra*, 624 F. Supp. at 25.

To distinguish *Ghanem*, plaintiffs argue that the D.C. medical licenses are necessary to permit Dr. Gahres and Dr. Radice to treat patients who live or work in D.C. *See* Pl. Opp. at 8, 11. This, plaintiffs claim, is because the phone conversations which the doctors have with patients located in D.C. constitute the practice of medicine in D.C.

In support of this argument, plaintiffs rely on an opinion issued by the D.C. Medical Society concluding that a psychiatrist located outside D.C., who conducted therapy sessions with patients located in D.C. by means of a videophone, would be practicing medicine in D.C. and would need to be licensed in D.C. Pl. Opp., Ex. 28. Not only is that opinion not binding on this court in determining the present question of jurisdiction; it is also obviously distinguishable. A psychiatrist who made

such an arrangement would be taking voluntary, affirmative actions to associate himself with D.C. in connection with the very core of his relationship with the patient. That differs substantially from the present case, where the patient regularly visits the doctors at their Virginia office, but may initiate contact over the phone for a specific and isolated concern or question. There is no indication that the D.C. Medical Society would conclude that this latter scenario constituted the practice of medicine in D.C.

Further, as the Court of Appeals wrote in *Mouzavires*, "[T]he most critical inquiry is not whether the non-resident defendant is physically present in the forum, but whether the contacts with the forum are of such a quality and nature that they manifest a deliberate and voluntary association with the forum." *Mouzavires, supra*, 434 A.2d at 995. Videophone therapy is of such a quality and nature. Responding on occasion to phone call inquiries is not.[42]

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42. Plaintiffs also cite the decision of the Honorable Harriett Taylor in *Huang v. D'Albora*, No. 1043-90 (D.C. Super. Ct. May 10, 1990), where the court found that a doctor was "transacting business" in D.C. when he called the parents of a child from Georgetown Hospital. *See* Pl. Sur-reply, Ex. A. The advice given by the doctor on that phone call, made while he was in D.C., was at the heart of the plaintiffs' claim, since the child died later that same night. The *Huang* case is not helpful to plaintiffs. Rather, it supports the defendants' argument that under § 423(a)(1), a defendants' location during a phone call — here, Virginia — is determinative.

Finally, the listing of Dr. Gahres & Dr. Radice in the Yellow Pages and the listing of Dr. Radice at the IMF Health Center do not help plaintiffs in this case. While "advertising reasonably calculated to reach a particular [forum] is one factor that may be considered in determining whether the exercise of jurisdiction would meet due process requirements," *id.* at 994; *Blair, supra,* 662 F. Supp. at 24, simply listing a phone number in a D.C. telephone directory is insufficient for the exercise of jurisdiction under § 423(a)(1). *Blair, supra,* 662 F. Supp. 21; *Cornwell, supra,* 373 F. Supp. 661; and *Ghanem, supra,* 624 F. Supp. 23. Indeed, an advertisement in the Washington Post which led to a contract to perform work in Virginia was found insufficient for jurisdiction under § 423(a)(1) despite the defendant telephoning and writing the plaintiff in D.C. during contract negotiations. *Cockrell, supra,* 458 A.2d at 717.

In any event, as with the patient plaintiff in *Ghanem,* Mrs. Bourdin was referred to defendants by a friend, that is, her sister-in-law — not as a result of any solicitation efforts directed to D.C. residents. Thus, there is no connection between the listing in the Yellow Pages or at the IMF Health Center and the claim. The mere fact that Mrs. Bourdin would not have gone to defendants unless their IMF insurance would cover the costs also does not mean there is a connection between the listing at the IMF Health Center and the claim. In his affidavit, Mr. Bourdin did not say that the listing was what caused Mrs. Bourdin to consult defendants. Even if it had been, however, the court would find the

connection between the listing and the claim too tenuous and insignificant for a finding that defendants were "transacting business" in D.C. *See Everett, supra,* 628 A.2d at 108; *Mitchell Energy Corp. v. Mary Helen Coal Co.,* 524 F. Supp 558, 564 (D.D.C. 1981); and *Bayles, supra,* 636 F. Supp. at 855.

Accordingly, it is this 6th day of June, 1996,

ORDERED, that the motion of defendants Luis C. Radice, Edward Gahres, and Gahres & Radice, M.D.'s, Ltd., to dismiss for lack of jurisdiction shall be granted on all claims pending in favor of defendants Luis C. Radice, Edward Gahres and Gahres & Radice, M.D.'s, Ltd. and against all plaintiffs in this action.

s/ Noel Anketell Kramer
NOEL ANKETELL KRAMER
JUDGE
SIGNED IN CHAMBERS

APPENDIX E — ORDER OF THE DISTRICT COURT OF COLUMBIA COURT OF APPEALS DENYING PETITION FOR REHEARING FILED APRIL 8, 2010

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 05-CV-1059

ALICIA ETCHEBARNE-BOURDIN, ET AL.,

Appellants,

v.

LUIS RADICE, ET AL.,

Appellees.

CAM12352-93

BEFORE: Washington, Chief Judge; Ruiz, Reid, Glickman, *Kramer, Fisher, Blackburne-Rigsby, Thompson, and Oberly, Associate Judges.

ORDER

On consideration of appellees' petition for rehearing en banc, and the response thereto; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

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* Judge Kramer is recused from this case.

Appendix E

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Chief Judge Washington and Associate Judges Glickman and Fisher would grant rehearing en banc.